86-206

Supreme Court, U.S.
FILED
AUG 11 1986
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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM W. MARTIN, ROBERT E. MOSHER, AND THE LEGAL ACTION COMMITTEE FOR MARLIN INVESTMENTS,
Petitioners,

v.

GILBERT ROBINSON, Trustee in Bankruptcy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 11, 1986

QUESTIONS PRESENTED

1. Whether the Court of Appeals, in affirming a decision approving a complex settlement agreement, countermanded the standards for the evaluation and approval of such agreements which have been laid down by this Court.

2. Whether the Court of Appeals, in affirming a decision approving a complex settlement agreement, erroneously adopted a "standard" for the evaluation and approval of such agreements which: 1) is in conflict with the standard recognized by the Second, Fourth, Fifth, Seventh and Eighth Circuits; and, 2) cannot be logically and consistently applied.

3. Whether the Court of Appeals, in affirming a decision approving a complex settlement agreement, erroneously sanctioned the denial of the right of bona fide objectors to such an agreement to receive reasoned responses to their principal objections, which denial is generally contrary to relevant decisions of other Circuits and is specifically contrary to decisions in both the Seventh and Ninth Circuits.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were:

Gilbert Robinson, Trustee in Bankruptcy, Appellee
William Everett Kane, Interested Party
Barbara Kelly, Interested Party
K & K Properties, Inc., Interested Party
William W. Martin, Objector, Plaintiff, Appellant
Robert E. Mosher, Objector, Appellant
Legal Action Committee for Marlin Investments, an unincorporated association, Objector, Appellant

The members of the Legal Action Committee for Marlin Investments, other than the parties named above, upon whose behalf such proceeding was pursued were:

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Melvin Alkema
Paul S. Allin
Alice R. Allison
Donald Anderson
Robert E. Anderson
Roger D. Anderson
John H. Anderton
Alfred E. Austerman
Catherine A. Babb
Theodore R. Babbini
David W. Baker
Louis Ballinger
Ralph A. Barksdale
Robert K. Barmore
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Jeffrey M. Christiansen
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Wynn L. Church
Mrs. Saint Cicero
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Don W. Clegg
John F. Clifford
William Clifford
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Owen B. Cohagan
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WILLIAM W. MARTIN, ROBERT E. MOSHER, AND THE LEGAL ACTION COMMITTEE FOR MARLIN INVESTMENTS,
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v.

GILBERT ROBINSON, Trustee in Bankruptcy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners William W. Martin, Robert E. Mosher, and the Legal Action Committee for Marlin Investments respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears at Appendix "J" to this petition at page 78. The Order Denying Rehearing and Amending Opinion appears at Appendix "K " at page 91. The opinion as amended on denial of rehearing is reported at 784 F.2d 1377 (9th Cir. 1986).

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit which is the basis for this petition was filed on March 17, 1986. The Court of Appeals denied a timely petition for rehearing and amended its opinion on May 13, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The provisions of Section 27 of the Bankruptcy Act of 1898, as amended, (11 U.S.C. § 50) are set forth in Appendix "M" at page 104.

STATEMENT OF THE CASE

Introduction

The matter which gives rise to this Petition does not, as the Court of Appeals incorrectly states at the outset of its opinion, involve approval of "a settlement agreement entered into between the bankruptcy trustee and the debtors," App. 79[1] or "a settlement agreement with K & K, Kane and Kelly and Kane and Kelly Associates to provide for the distribution of the K & K assets to the shareholders", as that opinion later states. App. 82. Instead, the present controversy involves approval of a Settlement Agreement (the "Agreement") whereby the Trustee and K & K released Kane, Kelly, Kane and Kelly Associates and all past directors of K & K from multiple claims in return for what Petitioners contend was inadequately evaluated and largely illusory consideration.[2]

Because of the confusion as to just what the agreement provides which permeates the Court of Appeals' opinion and the absence of any analysis of its terms from the Bankruptcy Court's Findings of Fact and Conclusions of Law, which are set forth in Appendix G hereto, Petitioners have deemed it necessary to set forth the Agreement in Appendix B. The nine individual claims and classes of claims which it releases are briefly, and in some

1. The Court of Appeals makes the same error again later in its Opinion. App. 82.

2. The jurisdiction of The Bankruptcy Court was invoked under 11 U.S.C. § 11.

instances inaccurately, described or otherwise alluded to principally in Recitals F, H, I, J, K, L and N and Sub-Paragraphs 1.3.2, 1.3.3, 1.3.31, 2.2.2 and Sections 3 and 5 of Agreement.[3]

Background of the Settlement

Petitioners William W. Martin ("Martin") and Robert E. Mosher ("Mosher") and some twelve hundred other individuals (the "investor-creditors") invested in eighteen (18) limited partnerships and joint ventures (the "A & C entities" or the "debtors") offered and sold by Barry S. Marlin ("Marlin") prior to January of 1976. In that month, Marlin transferred all of the assets of those entities to K & K Properties, Inc., ("K & K"), a newly formed Delaware corporation, organized by an attorney and Marlin business associate William Kane ("Kane") and Kane's associate Barbara Kelly ("Kelly") and having paid in capital of one thousand dollars. In return for all of their assets, the A & C entities received 80% of K & K's issued and outstanding shares, with the remainder standing in the names of Kane and Kelly. Petitioners Mosher and Martin shortly thereafter joined with other investors in the A & C entities to form Petitioner Legal Action Committee for Marlin Investments (the "LAC"), an unincorporated association which had some four hundred members by August of 1976. The LAC retained counsel and filed actions in the Superior Court of the State of California against Marlin, Kane, Kelly and K & K prior to May of 1976.

In May of 1976, Marlin, Kane and Kelly placed the K & K shares owned by the A & C entities in a purported "Voting Trust".[4] Thereafter, they retained counsel to file petitions under Chapter XI of the Bankruptcy Act on behalf of those entities.

---

3. The Court's attention is particularly directed to Recital N which lists all nine very generally. In the eight numbered Paragraphs of Recital "N", Paragraph (2) contains cross-reference to two pending actions in which the Trustee had a beneficial interest and one in which he had no beneficial interest.

4. The Voting Trust provided that it would expire on May 12, 1979, subject to possible extension by the beneficiary A & C entities until no later than May 12, 1981.

The proceedings in the Bankruptcy Court from August of 1976 through December of 1977 have been partially summarized by the Trustee in his Application to Compromise Controversy:

> "The above named-debtor and 17 other entities each filed petitions in this Court for relief under Chapter XI of the Bankruptcy Act on August 19, 1976. . . .
>
> "On the date when the Chapter XI cases were originally filed, the principal tangible asset of the then Chapter XI debtors in the aggregate was 80,030 shares of K & K Properties, Inc., a Delaware corporation ('K & K'). The balance of issued and outstanding shares thereof, 20,000 shares, were owned of record on said date by William Everett Kane ('Kane') and Barbara J. Kelly ('Kelly'). The principal assets of K & K were real property and notes and other instruments receivable. . . . Disputes arose concerning the rights of the debtors, creditors and others in connection with the original transaction wherein property was transferred by the debtor entities to K & K Properties, Inc., and claims were asserted against K & K, Kane and Kelly, on various theories. . . .
>
> "On or about December 21, 1977 . . . a settlement agreement was entered into by and between the debtors, K & K, Kane, Kelly and others ('1977 Compromise'). . . .
>
> "The 1977 Compromise purported, among other things, to effect various releases, other accommodations, and the transfer to K & K by Kane and Kelly of 3,000 shares of their common stock of K & K. Additionally, Kane and Kelly agreed to and did in fact 'cede' to K & K 2,000 additional shares of their stock, subject to return to them in the event of occurrence of certain conditions subsequent. *Thus, upon consummation of the Compromise, if the ceded shares were retained by K & K and cancelled, the estate would have owned 84.2%, and Kane and Kelly would have owned 15.7% of the issued and outstanding stock of K & K.* Thereafter, a 20 for 1 stock split was effected. App. 1-2. (Emphasis added).

The "1977 Compromise" also provided that K & K, Kane and Kelly would use their "best efforts" to: 1) effect the registration of the K & K shares held by the debtors pursuant to the Securities Act of 1933 in order to permit their distribution to the "investor-

creditors" pursuant to a Plan of Arrangement (the "Plan"); and, 2) effect the election of new trustees for the purported "Voting Trust" by the investor-creditors. Under its express terms, actions taken by the investor-creditors which asserted securities law violations in connection with such registration would not constitute breaches of the Compromise.

Under the Plan, K & K and its Employee Stock Ownership Trust ("ESOT") were to purchase 235,294 and 58,824 of K & K's shares, respectively, at 85 cents per share to pay the expenses of the Chapter XI proceedings. Kane and Kelly were the principal beneficiaries of the ESOT. App. 20. Their interest in K & K would also have been substantially increased by the proposed retirement of the 235,294 shares.

A Prospectus, dated August 29, 1978, was prepared by K & K Properties, acting through Kane and Kelly, for use in the solicitation of "consents" to the proposed Plan. It contained financial statements showing that the "fair value" of K & K's assets, net of mortgages, was some $2,276,000 as of March 31, 1978.

The Plan received the necessary consents from a majority in number and amount of the investor-creditors. After those consents had been given, but prior to the hearing on confirmation of the Plan, Petitioners secured testimony from Marlin which disclosed that: 1) Kane and Kelly held two thirds of their K & K shares as his nominees; and, 2) K & K's assets were worth several times the amounts represented in the Prospectus.[5]

Petitioners obtained leave to file objections to the Plan and, at the suggestion of the Bankruptcy Judge before whom the matter was then proceeding, filed an adversary proceeding for declaratory relief to determine, among other things, the truth or falsity of the asset valuations set forth in the Prospectus. That proceeding, as amended on June 4, 1979 (Adversary Proceeding "D"), sought a declaration that: 1) a series of actions taken and statements

5. Marin testified pursuant to a grant of limited immunity from prosecution after having pleaded guilty to six of twenty-four counts of a federal criminal indictment charging him with wire, tax, mail and securities fraud in connection with his real estate and other syndication activities. Such activities primarily involved sales to investors-creditors, including members of the LAC.

made or omitted by Kane, Kelly & K & K, beginning with the 1977 Compromise, were violations of the Securities Exchange Act of 1934 which constituted frauds on the Bankruptcy Court; and, 2) the 1977 Compromise should be set aside.[6]

The factual and statutory bases for the securities law violations alleged in Adversary Proceeding "D" were substantially the same to those alleged in *Mosher* v. *Kane*, 784 F.2d 1385 (9th Cir. 1986), which the Court of Appeals decided concurrently with the present action. That decision, which holds that Petitioners Mosher and Martin have stated claims for relief, is set forth in Appendix K for ease of reference.

On September 10, 1979, Judge Richard Mednick terminated the Chapter XI proceedings, adjudged the debtors bankrupt and appointed Gilbert Robinson Trustee. When the Trustee sought possession and control of the debtors' K & K shares, which still constituted 84.2% of those issued and outstanding, he was advised by Kane and Kelly that the purported "Voting Trust" had been extended for an additional two year term in March of 1979.

The Trustee thereafter instituted an action to contest the validity of the Voting Trust and secure all voting and other rights to the debtors' shares. In March, 1980, the Bankruptcy Court ruled that the Trustee was entitled to all voting and other rights to such

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6. The reasons for setting aside the 1977 Compromise are set forth in the Trustee's Application to Compromise Controversy:

> "It appeared that the causes of action described in Article I, H as the 'Marlin litigation', might vest in the trustee on behalf of the debtor estates, giving rise to claims that the A & C estate owned all or part of the shares of stock whose ownership had theretofore been confirmed in Kane and Kelly by reason of the 1977 Compromise. Thus said 1977 Compromise stands as an impediment to such claims by the trustee." App. 5.

That Application does not, however, explain the interrelationship of the "Marlin litigation" with Adversary Proceeding "D" or evaluate the probability of success on the merits in either action.

With respect to Adversary Proceeding "D", Recital "F" of the Agreement: 1) incorrectly summarizes the wrongs alleged therein which form the basis for setting aside the 1977 Compromise and makes no mention of fraud on the Bankruptcy Court; 2) incorrectly states that Martin sought damages; and, 3) fails to state that it is interrelated with the "Marlin litigation" which itself is not accurately described in Recital "H". See page 22, *infra*.

shares. K & K and the purported "voting trustees" then filed a notice of appeal. The trust expired by its own terms on May 12, 1981 without the Trustee having enforced his order in the California courts. He finally obtained an order that the debtors' shares be transferred to him on June 4, 1981.[7]

As Recital "L" of the Agreement admits, while the Trustee waited for the "Voting Trust" to expire, he relied on "an oral agreement and understanding" with "the then members of the Corporation's Board of Directors [including Kane and Kelly] whereby the status quo of the Corporation would be maintained. . . ." App. 17. Recital "L" goes on to state that such "oral agreement and understanding" was breached:

> "Trustee contends that the following actions violated the terms of said oral agreement and understanding: (1) The execution of the Associates Management Services Agreement Extension [paying Kane and Kelly $250,000 per year plus expenses]; (2) The execution of the P.F.L. Management Agreement Extension; (3) *The return of the 40,000 ceded shares to Kane and Kelly;* and (4) The contribution of 10,000 shares of the ESOT for the fiscal year ended 9/30/80, at a per-share value of $0.80. *"Trustee further contends that the ESOT's acquisition of 104,839 shares from Corporation for the fiscal year ended 9/30/79 was effected at per-share prices [62 cents per share] which were substantially below fair market value as of September 30, 1979, and, accordingly, that the ESOT has obtained such shares for an inadequate consideration."* App. 17. [Emphasis added.]

After obtaining voting rights to the Estates' K & K shares, the Trustee named himself and four others to the K & K Board of

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7. The foregoing description of the Trustee's activity, or lack thereof, in seeking to secure voting control of K & K between March of 1980 and June of 1981 parallels that found in Recital "D" of the Agreement. Under *Martin* v. *Martin*, 2 Cal.3d 752, 762-3 (1970), a decision of a Bankruptcy Court is a "final judgment" for the purposes of a state proceeding even though an appeal is pending. The Trustee never explained why he had not sought to enforce the judgment of the Bankruptcy Court in the California courts instead of relying upon the "oral agreement and understanding".

Directors. As noted below at pages 28 through 29 and in Appendix A, the four "independent directors" were major participants in negotiating and formulating the Agreement and often took positions contrary to those taken by the Trustee.

The Settlement Agreement

Under the terms of the Agreement, which was executed on January 6, 1982, the Trustee gave the following:

Releases

Pursuant to Section 5 of the Agreement, Kane, Kelly, Kane and Kelly Associates, all former K & K directors, P.F.L., Inc. and P.F.L.'s officers receive "special releases" from all claims "relating to or arising out of" the following:

> "(1) The validity, effect, establishment and administration of the Voting Trust and the Extension thereof; and the Voting Trust litigation;
>
> "(2) Matters arising from or relating to the litigation described in Recitals F, G, and H hereof;
>
> "(3) The validity, fairness, interpretation and performance of the 1977 Compromise; in particular Trustee shall acknowledge the binding effect of the 1977 Compromise;
>
> "(4) The preparation and promulgation of the 1978 Prospectus, with respect to the completeness and accuracy thereof;
>
> "(5) The creation and funding of the ESOP and ESOT; and, in particular, the propriety and validity of share purchases and share issuances to the ESOT, and the valuations upon which such transactions were based;
>
> "(6) The creation and implementation of indemnification agreements purporting to protect officers, directors and employees of Corporation, and others; . . . .
>
> "(7) The propriety, validity and effectiveness of the Associates Management Services Agreement and the Extension thereof, and any known claims of mismanagement by Kane, Kelly and/or Associates; and
>
> "(8) The propriety, validity and effectiveness of the P.F.L. Management Agreement and Extension thereof."

Intervention by trustee

Sub-Paragraph 2.2 provides that, within twenty days following the execution date of the Agreement, the Trustee (at the expense of the Estates) will take all actions as might be reasonably necessary to secure the dismissal of Adversary Proceeding "D". Under that same Sub-Paragraph, within forty-five days of the "approval date" of the Agreement, the Trustee agreed to "cause to be filed a Motion . . . to intervene in and dismiss with prejudice the Martin Cross-Complaint."

Indemnity

Sub-Paragraph 5.2.1 provides that Kane and Kelly shall "specifically be allowed to retain" a "limited indemnity" equal to eighty-five percent of any amounts otherwise allowable under K & K's by laws or Delaware corporate law.

Ongoing Influence in K & K

Paragraph 4.2 provides that: "neither corporation nor Trustee shall take any action which would result in an involuntary and disproportionate reduction in the percentage ownership of Kane, Kelly and/or Associates in the stock of Corporation." Paragraph 4.2 provides that the Trustee will vote his shares to elect both Kane and Kelly to K & K's seven member Board of Directors.

ESOT Shares

As noted above, the Trustee objected to the sale of 114,839 shares of K & K's stock to an ESOT for less than one tenth of its value in a corporate liquidation. According to the chart which appears in Recital "O" of the Agreement, only 105,906 shares remained in the ESOT as of December 1, 1981, of which 23,261 had purportedly vested. Out of the 57,311 shares allocable to Kane and Kelly, only 13,705 had purportedly vested.

Sub-Paragraph 1.3.3 provides that the ESOT and ESOT will be completely or partially terminated: "in a manner which will result in (i) the full vesting of all shares allocated to the respective ESOT accounts of the Monterey Group as of September 30, 1981, and (ii) the subsequent distribution of such fully vested

shares to the respective members of the Monterey Group *in accordance with the provisions of the K & K Properties, Inc. Stock Bonus and Employee Stock Ownership Plan."* (Emphasis added). Sub-Paragraphs 1.5 and 1.7.1 provide that such termination, with the consequent vesting and distribution of shares, will survive the recission of the Agreement.

The reason for the foregoing provisions of Sub-Paragraphs 1.5 and 1.7.1—a reason which the Trustee discovered for the first time in the course of the "fairness hearings"—was that no shares had ever vested in *anyone* through the ESOP and ESOT. An essential condition of vesting had never been satisfied.[8] Thus, the Trustee submitted, and the Bankruptcy Court made, Conclusion of Law 16 which was designed to sanitize the ESOP and ESOT transactions which he had formerly found to be objectionable.[9]

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8. Sub-Paragraph 12.07(b) of K & K's "Stock Bonus and Employee Stock Ownership Plan" provides:

> "(b) Notwithstanding any provision in this Agreement to the contrary, no Participant or Beneficiary shall have any right or claim to any assets of the Trust or to any benefit under the Plan resulting from any contribution made by Employer before the Internal Revenue Service determines that the Plan and Trust shall initially qualify as to such Employer under the provisions of Section 401(a) of the Internal Revenue Code of 1954 or any statute of similar import." ER 2556; O.Ex. 29.

9. "The objectors have asserted that the provisions of the Settlement Agreement requiring termination of the K & K Employee Stock Ownership Plan (the "Plan" or "ESOP") and the vesting of shares owned by the Plan participants was not affected by the termination of the Plan by the K & K Board of Directors due to the failure of the Internal Revenue Service to issue a letter of determination with respect to the Plan. The only evidence adduced at trial indicated that (1) any changes required to secure the issuance of such letter of determination would be ministerial in nature and within the authority of K & K to accomplish; (2) even in the absence of such a letter of determination, K & K could waive such requirement; and (3) by termination of the Plan, the shares owned by the Plan would vest in the participants notwithstanding the nonissuance of the letter of determination. The Plan was terminated and the shares vested in the participants effective January 6, 1982."

The Bankruptcy Court thus violated the rule stated by the Fifth Circuit in *Cotton* v. *Hinton,* 559 F.2d 1826, 1330 (5th Cir. 1977):

"Yet, in evaluating the terms of the compromise in relation to the likely benefit of a successful trial, the trial judge ought not try the case in the settlement hearings. *Young* v. *Katz, supra.* 'It cannot be overreemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any

In return for the foregoing consideration, the Trustee, the corporation *and the incumbent K & K directors* received the following:

K & K Shares

Under Section 4, Kane and Kelly agreed to transfer 90,000 K & K shares to the Trustee. After that transfer and the termination of the ESOP and ESOT (which termination gained them 57,311 shares in addition to the 40,000 shares which they had misappropriated) they had some 7,311 more K & K shares than they had in 1979 when the Trustee was appointed, but a slightly lower percentage of the total number of shares outstanding because of the dilution caused by such termination and the resultant issuance of "ESOT shares" to others.[10] Such dilution had a greater impact on the percentage of K & K's outstanding shares held by the Trustee, reducing his percentage from 84.2% to 82.2%.

Resignations of Kane and Kelly

Sub-Paragraph 2.1 provides that Kane and Kelly would "permanently resign" as officers of K & K.

Indemnity Funds

Section 3 provides for a partial release of corporate funds which had been held in escrow to provide for the payment of Kane's and Kelly's legal fees.

Releases

Under Sub-Paragraph 1.3.3.1, the Trustee and K & K received releases from various employees. Sub-Paragraph 5.2 provides

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ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.' *City of Detroit* v. *Grinnell Corporation,* 495 F.2d 448, 456 (2d Cir. 1974), *Grunin* v. *International House of Pancakes,* 513 F.2d 114, 123 (8th Cir. 1975)."

The Petitioners presented and qualified a nationally recognized expert on ESOPs and ESOTs, but the Trustee's counsel successfully objected to his testimony. App. 62. RT 1375:22-1385:19.

10. To restate what is fairly obvious, they had appropriated 40,000 shares in violation of their "oral agreement and understanding" with the Trustee, received 57,311 shares from the ESOT and gave back 90,000 shares.

for the Trustee, K & K and the incumbent Directors to receive general releases from Kane, Kelly and Kane and Kelly Associates while Sub-Paragraph 5.3 provides that Kane and Kelly will be responsible for obtaining such releases from others.

The Bankruptcy Court and District Court Proceedings

The Trustee filed his Application to Compromise Controversy (the "Application") on January 26, 1982. Thereafter, over a period of nearly fifteen months: 1) Petitioners filed their Objections to the Applications (the "Objections") on February 11; 2) a total of some twenty hours of hearings (the "fairness hearings") were held between February 23 and April 26; 3) the Bankruptcy Court filed its "Memorandum of Decision" on June 18;[11] 4) the Trustee filed his Proposed Findings of Fact and Conclusions of Law on August 30, together with a Proposed Order Approving Compromise and Dismissing Adversary Proceeding "D"; 5) Petitioners filed Objections to those Findings and Conclusions on September 13; and, 6) the Order Compromising Controversy and the Findings of Fact and Conclusions of Law were entered on April 18, 1983. Appellants filed an appeal to the District Court which entered its order summarily affirming the decision of the Bankruptcy Court on June 22, 1984. The Petitioners thereafter filed a timely appeal to the Ninth Circuit.

The Court of Appeals Proceedings

On March 17, 1986, the Ninth Circuit affirmed the judgment of the District Court. The Court of Appeals' Opinion held that: 1) the Bankruptcy Court's Findings of Fact and Conclusions of Law, either separately or considered together with specified documents and categories of testimony, satisfied the requirement that a court, in approving a settlement, must make an independent comparison of the provisions of the compromise with the likely rewards of the claims to be settled and express its decision that it is fair in terms which are adequate to show that it reached a

11. There is an obvious and material difference between the Memorandum of Decision and the Findings of Fact and Conclusions of Law, *i.e.*, the latter encompasses an acceptance of all the terms of the Agreement while the former does not. App. 63.

reasoned and independent conclusion; 2) an erroneous Conclusion of Law, when considered together with a Conclusion of Law which the Court deemed to be correct, did not relieve the Trustee from the burden of proving that the Agreement was fair and equitable; 3) specified documents and categories of testimony in the record supported a finding that the Agreement was fair and equitable; 4) the Bankruptcy Court made legally sufficient responses to Petitioners' Objections; and, 5) that Court did not erroneously limit testimony regarding the negotiating process if "the Court did not prohibit such questioning altogether."

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' FAILURE TO ENFORCE STANDARDS FOR BOTH EVALUATION AND APPROVAL OF COMPLEX SETTLEMENTS LAID DOWN BY THIS COURT RENDERS THEM MEANINGLESS IN THE NINTH CIRCUIT AND RESURRECTS THE PROBLEMS WHICH THEY WERE DESIGNED TO ELIMINATE.

Over eighteen years ago this Court, stated, clearly and unequivocably, what a court must do in order to determine that a settlement agreement is fair and equitable:

> "There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. *Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation. . . .*" *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 424-5 (1968) ("TMT Trailer"—Emphasis added).

This Court went on to state, in no less clear and unequivocal language, how the approval of a settlement agreement must be expressed so that such approval can be the subject of an adequate appellate review:

> "If the quoted statement of the trial court had been the result of an adequate and intelligent consideration of the merits of the claims, the difficulties of pursuing them, the potential harm to the debtor's estate caused by delay, and the fairness of the terms of settlement, then it would without question have been justifiable to approve the proposed compromises. It is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law. Here there is no explanation of how the strengths and weaknesses of the debtor's causes of action were evaluated or upon what grounds it was concluded that a settlement which allowed the creditor's claims in the major part was 'fair and equitable.'" 390 U.S. 414, 434.

This matter has arisen because the Bankruptcy Court, in approving a complex settlement agreement, elected to ignore the standards laid down in *TMT Trailer*. The Ninth Circuit, in turn, has failed to enforce the application of *TMT Trailer*, so that its decision invites further errors in the approval of complex settlements and the unnecessary proliferation of future appeals.

As the dissenting opinion in *TMT Trailer* noted, that matter had been before the Fifth Circuit "on six occasions . . . at various stages." 390 U.S. 414, 454. Consequently, it is not surprising that the Fifth Circuit has been quite careful and consistent in applying this Court's decision in *TMT*. In a line of cases which include *In the Matter of Jackson Brewing Co.*, 624 F.2d 605 (5th Cir. 1980); *In re: Corrugated Container Anti-Trust Litigation*, 643 F.2d 195 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 and 456 U.S. 1012 (1982); and the *Matter of Aweco, Inc.*, 724 F.2d 293 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 244 (1984), it has shown a clear and consistent understanding of its mandate:

> "[O]n appeal, an appellate court . . ., must ensure that the compromise if fair, equitable and in the best interest of the estate. . . . The Supreme Court has explained that review on appeal must be grounded in clear support in the record, *coupled with sound analysis by the District Court.*" *In the Matter of Jackson Brewing Co., supra,* at 607. (Emphasis added).

The decision below made a major departure from the standards laid down by this Court's decision in *TMT Trailer* when it held that the Bankruptcy Court's Findings of Fact and Conclusions of Law were adequate. App. 88. In fact, its discussion of them virtually turns those standards upside down.

After citing the appropriate language from *TMT Trailer* regarding the need for a reasoned cost-benefit analysis, the Court of Appeals stated: "However, the Court gives us no specific direction on how much specificity or detail the bankruptcy court is required to put into its findings of fact or conclusions of law in order to comply with the Supreme Court's language." App. 87. What it failed to appreciate is that this Court set minimum standards by clearly stating in *TMT Trailer* that findings and conclusions are *inadequate* if they are: "mere boilerplate approval phrased in appropriate language, but unsupported by evaluation of the facts or analysis of the law." 390 U.S. 433, 434. The Findings of Fact and Conclusions of Law in the present matter are precisely the kind of "boilerplate" which was condemned in *TMT Trailer,* being devoid of either legal or factual analysis.

After conceding that "the bankruptcy court's findings of fact and conclusions of law are rather general," the Court of Appeals attempted to justify them:

> "However, the bankruptcy court attached to these findings and conclusions a copy of the settlement agreement upon which it relied, and which it approved. The settlement agreement, which is twenty-five pages in length, *sets forth in detail the claims which it purports to settle,* the parties involved, the *valuation of the corporate assets,* the identity of shareholders and the number of outstanding shares, *the cost-benefit analysis of the relative merits of pursuing or settling the various claims,* and *the conditions which*

> *would enable the trustee to proceed with the liquidation."* App. 87. (Emphasis added).

While a casual reading of the Agreement establishes that it is some twenty-five pages in length, such a casual reading also shows that it contains only very general descriptions of settled claims and absolutely no: 1) "valuation of the corporate assets"; 2) "cost-benefit analysis of the relatively merits of pursuing or settling the various claims"; or, 3) "the conditions which would enable the trustee to proceed with the liquidation."

The Court of Appeals goes on to describe the other "evidence" which the Bankruptcy Court had before it:

> "Thus, in addition to the settlement agreement, the bankruptcy judge had heard testimony on the value of the corporation's assets, the terms of the ESOT (which appellants challenge), and was well aware of the claims being asserted by appellants in their Adversary Proceeding D, which was before the court. There is a clear support in the record for our affirming the findings of fact with respect to the approval of the compromise." App. 88.

Conspicuously absent from that list are: 1) any *mention* of the claims (other than Adversary Proceeding "D" and the ESOT) referred to, but not analyzed, in Recital "N" of the Settlement Agreement;[12] 2) any testimony by the Trustee or any witness appearing on his behalf regarding the value of his claims, together with the costs of pursuing them; 3) any such testimony regarding the value of what was received in exchange for such claims; and, 4) any analysis of the fairness of such exchange. As noted below, the record is devoid of any such valuations or analyses.

The Court's only authority for its endeavor to "make bricks without straw" is an inaccurate reading of *In re: Flight Transportation Securities Litigation,* 730 F.2d 1128 (8th Cir. 1984):

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12. Paragraph 2 of Recital "N" incorporates Recital "H" which inadequately describes the "Marlin Lawsuit". Recital "H" fails to state either that: 1) the "Marlin Lawsuit" asserts a claim for shares in K & K & supra having a liquidation value of some $3,000,000; or, 2) the Trustee is the principal claimant in Marlin's personal bankruptcy. See: page 23, *infra.*

> "Appellate review is made more difficult by the lower court's failure to write an opinion explaining why it deemed the compromise to be fair, reasonable and adequate. *See In re Flight Transportation Corp.* [sic], 730 F.2d at 1136. However, where the record supports approval of the compromise, the bankruptcy court should be affirmed. *See, e.g., i.d.*" App. 87.

In *Flight Transportation*, the Eighth Circuit approved two aspects of a settlement agreement which involved purely legal issues which, as it pointed out, had been fully briefed in the proceedings below.[13] Approval of the third aspect of the settlement (which involved both factual and legal questions) was reversed and remanded to the District Court. *In re: Flight Transportation Securities Litigation, supra* at 1136-9.

The Fifth Circuit's opinion in *Corrugated Container* sets forth one of the best and most succinct recent summaries of what a Court of Appeals must demand of a lower court which is responsible for the approval of a complex settlement agreement:

> "'[T]he strength of the case for plaintiffs [must be] balanced against the amount offered in settlement.' *West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.). We think this requires a three-step process. First, the district court must evaluate the likelihood that plaintiffs would prevail at trial. Second, the district court must establish a range of possible recovery that plaintiffs would realize if they prevailed at trial. And third, guided by its findings on plaintiffs' likelihood of prevailing on the merits and such other factors as may be relevant, the district court must establish, in effect, the point on, or if appropriate, below, the range of possible recovery at which a settlement is fair and adequate. . . . [T]he district court judge must 'undertake an analysis of the facts and the law relevant to the proposed compromise,' and he must 'support his conclusions by memorandum.' *Cotton* v. *Hinton* 559 F.2d at 1330. . . .This is because '[a]n appellate court. . . .must have a basis for judging the exercise of the

13. In doing so, it was able to make—and was careful that it did make—what, for all practical purposes, amounted to a *de novo* review of those legal issues in order to determine that they constituted close legal questions which made the compromise fair, reasonable and adequate.

> trial judge's discretion.' Id." *In re: Corrugated Container Anti-Trust Litigation, supra at* 212.

The opinion in *Corrugated Container* provides an instructive contrast to the decision below, illustrating the proper implementation of this Court's decision in *TMT Trailer.* In *Corrugated,* the District Court made analyses of both legal and factual issues affecting the reasonableness of a settlement which transcended mere "boilerplate", but were still found wanting.[14]

In the present matter, it is impossible to tell from either the Bankruptcy Court's Findings of Fact and Conclusions of Law *or* the decision of the Court of Appeals: 1) what the range of potential damages recoverable by the Estates was; 2) what the legal and factual issues affecting such recoveries were; and, 3) how (or, moreover, whether) the Trustee and the Bankruptcy Court evaluated the relative costs and benefits of recovering those potential damages. As Petitioners will discuss below, the Trustee presented no evidence regarding recoverable damages which could have formed the basis of a cost-benefit analysis.

Putting aside the questions of the adequacy of the Bankruptcy Court's Finding of Fact and Conclusions of Law, they simply do not conform to other substantive legal requirements for the approval of settlement agreements. The litany of errors begins with Conclusion of Law 5, which the Court of Appeals recognizes as an erroneous assignment of the burden of proof:[15]

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14. Regarding the adequacy of that Court's analysis of a legal issue affecting potential damages, the Court of Appeals stated:

> "Its decision on this matter is an essential element of its overall decision to approve these settlements, but since the court has not provided us the benefit of its thinking, we are unable to review it." *In re: Corrugated Container Anti-Trust Litigation, supra* at 214.

Similarly, on factual issue affecting potential damages, it concluded:

> "Given the importance of the question of potential damages, the district court was compelled to consider the validity of the estimate [out of two opposing damage studies] on which it relied. If the court did find the estimate to be valid, it was bound to explain why." *In re: Corrugated Container Anti-Trust Litigation, supra* at 215.

15. "It is clear that there must be more than a mere good faith negotiation of a settlement by the trustee in order for the bankruptcy court to affirm a compromise agreement. The court must also find that the compromise is fair and equitable. *See, e.g., Citibank, N.A.* v. *Baer,* 651 F.2d 1341, 1345-46 (10th Cir. 1980)." App. 84.

> "5. Where, as in this case, a compromise has been negotiated in good faith be a Trustee, and is reasonably believed by him to be the best compromise negotiable under the facts of the given case, the court should approve the recommended settlement." App. 72-73.

The assertion that the Agreement was "the best compromise negotiable under the circumstances" is the closest that the Bankruptcy Court ever came to saying that it regarded the Agreement as being fair and equitable. As the Court of Appeals stated in In re: *Corrugated Container Anti-Trust Litigation, supra,* at 215: "Even if the court is correct, however, that more money could not have been obtained, there is no reason to approve an otherwise inadequate settlement solely because it was the best offer defendants were willing to make."[16] The necessary conclusion that the Agreement was fair and equitable, based upon a comparison of the terms of the compromise with the likely rewards of litigation, was simply missing.

The Court of Appeals did more than simply ignore the absence of a "fairness" finding. It also rejected Petitioners' contention that the Bankruptcy Court misallocated the burden of proof that the Agreement was fair, by: 1) holding that any error in Conclusion of Law was somehow cured by Conclusion of Law 4; and, 2) doing so without considering the Finding of Fact upon which Conclusion 4 was predicated.

Conclusion of Law 4 states that:

> "4. The Bankruptcy Court had discretion to and should approve the compromise recommended by the Trustee in Bankruptcy after a hearing held upon appropriate notice, where it appears, as it does in this case, that expense, *benefits,* hazards and complexity of litigation, potential

16. As the Second Circuit said in *In re: W. T. Grant,* 699 F.2d 599, 613 (2d Cir. 1983), "We conclude by reemphasizing that the task of the bankruptcy judge was not to determine whether the settlement was the best that could have been obtained, something that neither he nor we can ever know, but whether it 'fall(s) below the lowest point in the range of reasonableness.' *Newman* v. *Stein,* supra, 464 F.2d at 692."

> delay and waste of time, effort and expense might otherwise result." App. 72. (Emphasis added).[17]

Finding of Fact 9 states that:

> "9. The Trustee has properly and reasonably determined and recommended that continued prosecution of the various claims released pursuant to said Settlement Agreement are complex, uncertain of result and potentially expensive both in terms of attorneys' fees, court costs, and delay required, which delay could reasonably be expected to result in damage to the estate or detriment to creditors." App. 68-69.

In other words the "appearances" recited in Conclusion of Law 4, which supposedly correct the error in Conclusion of Law 5, are predicated upon the very general "reasonable beliefs" of the Trustee set forth in Finding of Fact 9. The Bankruptcy Court's "reasoning" goes round and round without explanation or analysis.

The Court of Appeals "last words" regarding fairness are:

> "The application to compromise the controversy and the settlement agreement, along with the testimony of hearings on the application, indicate that the court made a full and fair independent assessment of the wisdom of the compromise. Cf. *Matter of Boston & Providence Railroad Corp.* . . . The trustee's application and the settlement agreement *set forth in detail the claims pending against the bankrupt estate, and an evaluation of those claims.* Furthermore, the findings and order of the bankruptcy court indicate that it made an independent evaluation from the trustee's application and settlement agreement, and from the rest of the proceedings before it. Cf. Id. at 12-13." App. 88-89 (Emphasis added).

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17. Apart from being wrong because it does not involve a "weighing" test—i.e., "expense, *benefits*, hazards and complexity of litigation, potential delay and waste of time, effort and expense" are factors which "might otherwise result" from any litigation, no matter how promising—Conclusion of Law 4 is incoherent and unintelligible. In throwing "benefits" into the middle of a list of costs and risks the Bankruptcy Court was doing worse than mixing apples and oranges: it was mixing apples with poisoned mushrooms.

They bear an interesting similarity to what this Court dubbed "the last word that the trial court said on the merits of the compromises. . . ." in *TMT Trailer*. 390 U.S. 414, 433.

A comparison of the Findings of Fact and Conclusions of Law signed by the Bankruptcy Court with those originally submitted by the Trustee's counsel directly contradicts the statement made by the Court of Appeals in the last sentence set forth above. Both sets of Findings and Conclusions are set forth in parallel columns in Appendix F hereto for ease of comparison. The Bankruptcy Court's only changes in the Proposed Findings and Conclusions consisted of a modification of Proposed Finding 10 which makes it inconsistent with Proposed Finding 4—a Finding which the Court did not change—and the addition of a new Finding 10a: "The factors described in Finding of Fact 9 hereof have been fully and reasonably explored and considered."[18]

The first sentence of the Court of Appeals' "last word" regarding fairness is a non-sequitur since what the Bankruptcy Court may have read and what it may have heard cannot give any indication of what it thought. The next sentence is puzzling for the reasons which have been set forth in detail above and need not be repeated here.

So far as the "testimony of [sic] the hearings on the application" is concerned, the Court of Appeals was presumably referring to the limited testimony dealt with on page 16 above. The Trustee's case in chief consumed a brief eleven pages and is set forth in Appendix "E." Following his brief testimony in support of the Agreement, the Trustee was questioned in detail by the Petitioner's counsel regarding his investigation, knowledge and evaluation of the claims. As to at least seven separate causes of action against Kane and Kelly, he either had no opinion, would

18. "The mechanical adoption of a litigant's findings is an abandonment of the duty imposed on trial judges by Rule 52, F.R.Civ.P., because findings so made fail to 'reveal the discerning line for decision * * *.'" *Kelson* v. *United States*, 503 F.2s 1291, 1294-5 (10th Cir. 1974), citing *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657, n.4. In the present matter, the Bankruptcy Court not only failed to renumber the Trustee's Proposed Findings of Fact and Conclusions of Law; it had Proposed Finding 10 "whited out" and inserted the new 10 and 10a in its place.

express no opinion or had made no investigation with respect to the relative costs and benefits of litigation.[19] There was no redirect examination of Trustee and none of his counsel testified as to what they may have done.

He could not estimate the value of the K & K stock that he claimed to be receiving (RT 958:3-960:25) or explain the method followed in formulating the Agreement:

> "Q. [By Mr. Noble] 'How did you decide the value of the things that are being swapped one for the other? 'I mean, you just didn't say this is a blue ball and this is a yellow ball and we like one rather than the other, some process went into deciding what the value of the shares was as a bargaining counter, and I'd like to know what that was.'"
>
> "A. 'Well, I don't know how to answer that question. . . .' The negotiations and the negotiating process has taken a period of years. . . .
>
> 'It started out by my Attorney and I evaluating various problems and figuring out what we might be entitled to, what we might not be entitled to, and trying to figure out what the final outcome was. '*And not always did we—we didn't equate that necessarily with dollars.*' " RT 960:8-25. (Emphasis added).

Regarding the "Marlin Lawsuit", which is not mentioned in the Bankruptcy Court's Findings of Fact and Conclusions of Law and is inaccurately described in Recital "H" of the Agreement,[20] the

19. RT 967:2-974:25; 981:12-982:21; 983:8-987:8; 988:6-16; 989:12-991:10; 992:5-18; 993:2-9; 994:17-996:5. The total number of pages of transcript devoted to the "fairness hearing" was 569. Because of the need to refer back to a series of hearing in the Bankruptcy Court which began in 1977 in the "Statement of Facts" in Petitioners' Opening Brief in their appeal, transcripts of various hearings which pre-dated the execution of the Settlement Agreement were included in the Reporter's Transcript and renumbered sequentially by date.

20. The description of the "Marlin Lawsuit" which appears in Recital "H" does not inform creditors of their beneficial interest in that litigation. Paragraph 14 of the "Marlin Lawsuit," for example, specifies the relief sought in the Third Cause of Action: "14. Plaintiff is the owner of a 13⅓% interest in the total issued and outstanding stock of K & K for the use and benefit of the limited partners of the aforesaid eighteen limited partnerships and joint ventures and plaintiff seeks a declaration of this so holding. . . ." ER 2210-2211.

Trustee showed a somewhat cavalier attitude toward both the matter itself and the size of the estate:

> "Q. [By Mr. Noble] 'What's involved in the Marlin litigation?'"
>
> "A. 'Whether or not Kane and Kelly have any interest in this property at all. . . .Whether they're holding any percentage for Marlin. . . .'"
>
> "Q. 'What's involved there in terms of dollars?'"
>
> "A. 'What is 15 or 20 percent of this corporation worth when it's liquidated? 'Whatever it is'"
>
> "Q. 'Do you know, Mr. Robinson?'"
>
> "A. 'I don't know what the value of the corporation is when it's liquidated. When we finish selling out the properties, then that percentage is what's involved.'"
>
> "Q. 'You don't know what it's worth today, the—'"
>
> "A. 'Well, let me refer you to the letter that Mr. Looby sent you where he said the value, the equity value was something in excess of twenty million dollars, if all the assumptions are accurate and the appraisals are fairly reasonable.
>
> 'And 15 or 20 percent of that is three or four million dollars.'"
>
> . . . .
>
> "Q. 'How do you value the Marlin litigation, or did you value the Marlin litigation?'"
>
> "A. 'My comment is we sure did talk about it long and hard. And as a matter of fact you may be aware that I retained special counsel by way of Gibson, Dunn & Crutcher to do an investigation and to perhaps undertake that litigation[21]
>
> 'So I have been concerned about it, but I'm also aware it will be extensive, expensive and time consuming.'"
>
> "Q. 'Did you assign it any value at all in making an exchange with Kane?'"
>
> "A. 'I have no way of assigning a dollar value to that.'"
>
> "Q. 'Did you assign any value at all to it.'"
>
> "A. 'In my mind it was a potential asset of the estate.'" RT 971:21-974:8.

21. No other reference was made to this alleged investigation in the course of the proceedings below.

II. THE COURT OF APPEALS' DECISION REJECTS LOGICAL EXTENSIONS OF STANDARDS LAID DOWN BY THIS COURT FOR EVALUATION OF COMPLEX SETTLEMENTS WHICH HAVE BEEN DEVELOPED AND APPLIED IN THE SECOND, FOURTH, FIFTH, SEVENTH AND EIGHTH CIRCUITS IN FAVOR OF A "STANDARD" WHICH CANNOT BE LOGICALLY AND CONSISTENTLY APPLIED.

Neither the Bankruptcy Court nor the Court of Appeals gave any consideration to probability of the Trustee's success on the merits in any of the actions which he compromised. Such omissions are particularly striking since, post-*TMT Trailer*, Courts of Appeal which have been called upon to review approvals of complex settlement agreements have—with at least one notable exception among the Circuits—held that the probability of success on the merits is the most important factor to be considered in determining whether a settlement is fair and equitable.

As the Seventh Circuit said in deciding *In re: General Tire and Rubber Securities Litigation:*

> "The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. *Newman* v. *Stein*, 409 U.S. 1039 . . . (1972). The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured. See *Cotton* v. *Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)." 726 F.2d 1075, 1086 (7th Cir. 1984).

Similarly, in *Parker* v. *Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982), the Fifth Circuit observed that the "probability of success" is coming to be recognized as the primary factor to be considered in evaluating the approval of a settlement:

> "In deciding whether a clear abuse of discretion has occurred, we share the view of our colleagues of the Second, Fourth and Eighth Circuits that, absent fraud or collusion, the most important factor is the probability of the plaintiffs' success on the merits. . . ."

The Ninth Circuit, on the other hand, has adopted a "standard"—if one could call it that—for the approval of settlements and the review of such approvals which is simply bewildering:

> "The district court's ultimate determination will necessarily involve a balance of several factors which *may include, among others, some or all of the following:* the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. . . . *This is by no means an exhaustive list of relevant considerations, nor have we attempted to identify the most significant factors.* The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice* v. *Civil Service Commission,* etc., 688 F.2d 615, 625 (9th Cir. 1982). (Emphasis added).

The grave problems posed by the Ninth Circuit's "standard", as set forth in *Officers for Justice,* are fairly obvious. The parties negotiating and formulating a settlement are left without any meaningful and objectively applicable standards governing what they should do in negotiating a settlement in order to both adequately protect the interests which they represent and avoid the production of an agreement which is open to challenge on various grounds.[22] Once the settlement has been formulated, its proponent is then left without meaningful guidelines regarding the showing which he must make to a court in order to secure its approval. The court itself is left without adequate guidance as to

22. Such grounds include: 1) inadequate investigation and evaluation of causes of action, 2) failure to adequately evaluate purported benefits, 3) failure to avoid actual or potential conflicts of interest; and, 4) haste in formulation. Cf. *In re: General Motors Engine Interchange Litigation,* 594 F.2d 1106, 1123-1128 (7th Cir. 1979); *In re: Corrugated Container Anti-Trust Litigation, supra.*

what showing it must demand from such proponent in order to fulfill its heavy responsibility for determining that the agreement in question is fair, reasonable and adequate. Finally, the Court of Appeals has no clear, objective standards to guide it in deciding whether the lower court has fulfilled its responsibility.

The importance of the present matter does not lie primarily in the fact that several million dollars in potentially recoverable claims were surrendered without adequate investigation by a trustee and without adequate consideration and evaluation by the Bankruptcy Court. Instead, this matter is of great significance because it illustrates just what can and will happen when both the settling parties and the courts are given loose and ill-defined "standards" to apply in the formulation, approval and review of complex settlements. Furthermore, the very looseness of the "standards" encourages the extreme carelessness in their application which was dealt with in the preceding section of this Petition.

III. THE COURT OF APPEALS' DENIAL OF THE RIGHT OF BONA FIDE OBJECTORS TO A COMPLEX SETTLEMENT TO RECEIVE REASONED RESPONSES TO THEIR PRINCIPAL OBJECTIONS IS WITHOUT RECENT PRECEDENT IN THE NINTH CIRCUIT OR ANY OTHER CIRCUIT.

In *Flight Transportation*, the Fifth Circuit reaffirmed the principle that, in determining the fairness of a complex settlement, a court must give due consideration to the objections made by the interested parties:

> "In exercising its discretion, the District Court must consider all factors bearing on the fairness of the settlement, including:. . . . the paramount interest of creditors and a proper deference to their reasonable views in the premises. *Drexel* v. *Loomis*, 35 F.2d 800, 806, (8th Cir. 1929). Accord *Protective Committee for Independent Stockholders of TMT Trailer Ferry. . . ." In re Flight Transportation Securities Litigation, supra* at 1135.

The necessity for a court to make reasoned responses to objections to settlement agreements antedates *TMT Trailer* which, after all, arose as a result of such unanswered objections. It has become so much a part of the general *TMT* requirement for reason and specificity in decisions approving complex settlements that Courts of Appeal seldom make a point of stating it as a separate requirement.

The procedure which should have been followed by the Bankruptcy Court in dealing with Petitioners' Objections in order to give "proper deference to their reasonable views" was set forth by the Ninth Circuit in *Mandujano* v. *Basic Vegetable Products, Inc.*, 541 F.2d 832, 836 (9th Cir. 1976):

> "The hearing which an objection of substance makes necessary must be sufficient to enable the trial court to set forth on the record a reasoned response thereto. Such findings of fact and conclusions of law as may be necessary to support the response must also appear on the record."

Since *Mandujano* involved a Title VII action, and the opinion stressed the utility of objections as a means of effecting settlements in such actions, the Court of Appeals in the present matter took Judge Sneed's *dicta* as an invitation to limit the requirement for reasoned responses to meaningful objections to actions arising under Title VII. App. 89. In so doing, it was inconsistent with the Ninth Circuit's earlier decision in *Marshall* v. *Holiday Magic*, 550 F.2d 1173, 1179 (9th Cir. 1977) which held that *Mandujano* applied in class actions involving securities fraud unless the objecting parties were simply "spoilers" who objected merely to impede the settlement and further their particular self interests. The named Petitioners and the more than four hundred members of the LAC clearly are not "spoilers".

After making the foregoing error, the Court of Appeals layered another on top of it by stating that the Bankruptcy Court had, in fact, "touched all material bases of the creditors' objections" and had "held directly, expressly or by necessary implication, on every substantial point of contention." App. 89. One has only to compare the Objections with the Bankruptcy Court's Findings of Fact and Conclusions of Law in order to see that no attempt was

made to follow established procedure for dealing with such Objections. The Bankruptcy Court's failure to respond to them compounds the problems presented by the Findings and Fact and Conclusions of Law which have been described above.

To illustrate the seriousness of those Objections, six of them are set forth in Appendix C. The Fourth and Fifth both deal with the fact that the Trustee, to the Estate's detriment, delegated the primary responsibility for framing the Agreement to the "Independent Directors" whose interests were in conflict with those of the creditors. Those Objections directly challenge the fairness of the process by which that Agreement was negotiated and drafted. The Eighth and Ninth Objections are based upon the fact that the Agreement contains two provisions which are both contrary to applicable California corporate law and unfair to the creditors.[23]

As significant as the foregoing Objections are, the most important are the Eleventh and Twelfth. The former asserts that: 1) "The Agreement is unfair to the creditors in that it does not rest upon a careful valuation of the varied and numerous claims against Kane and Kelly which were surrendered;" and, 2) "Neither the Notice nor the Application provides the creditors with information sufficient to enable them to make an independent evaluation of those claims." The Twelfth gives an outline of some of the causes of action that the Trustee has relinquished which is followed by an explanation of why the purported consideration which he received is illusory.

Prior to the filing of the Objections, the Petitioners' counsel had received the letter from K & K's counsel, which is attached to them as Exhibit D. In it, he revealed that the K & K Directors appointed by the Trustee had been major participants in negotiating the Agreement and had taken positions in its negotiation which were contrary to the interests of the Trustee.

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23. It is curious that: 1) the Trustee's counsel was strongly opposed to the provision which is involved in Objection 9; 2) it was forced upon him by Kane and Kelly; 3) the Court received testimony to that effect from one of the Trustee's friendly witnesses; and yet, 4) the Court did not respond to the Objection. RT 1316:8-1317:12.

At the fairness hearings Carl Albert, K & K's President, admitted that conflicts of interest did, in fact, exist:

> "Q. [By Mr. Noble] 'Did you have any concern at all regarding the accuracy of the Davidson Report?'"[24]
>
> "A. 'Accuracy for the purposes for which we were obtaining it. *You must remember, Mr. Noble, throughout our tenure as directors our concerns were in many instances different than yours or even Mr. Robinson in his capacity as trustee. . . .*"
>
> *'We were not interested in spending corporation assets in order to have a stock evaluation made which might prove the point, that you are any other person might want to prove in connection with evaluation initially established. . . .'*" RT 1093: 3-15. [Emphasis added.]

In determining whether settlements should be approved, courts normally are quite concerned about whether their negotiation was marred by conflicting interests, e.g., *In re: General Motors Corp. Engine Interchange Litigation, supra,* at 1123-28 (7th Cir. 1979); *In re: Corrugated Container Anti-Trust Litigation, supra,* at 207-210. The Bankruptcy Court made no response whatsoever to the Fourth and Fifth Objections despite the fact that an admitted conflict of interest existed and material damage to the interests of the creditors had resulted from it.

The Court of Appeals' only references to the Petitioners' contentions regarding the unfairness of the negotiating process is found under its discussion of "Exclusion of Evidence and Testimony" *e.g.*: "In this case, although the bankruptcy court may have limited appellants' questioning of witnesses with respect to the negotiating process involved in the settlement agreement, the court did not prohibit such questioning altogether." App. 90. That statement puts it in direct conflict with the Seventh Circuit's decision in *Engine Interchange* which held that substantial limitation or exclusion of evidence regarding negotiations is inherently an abuse of discretion because it indicates that the court approving a settlement agreement failed to recognize the importance of

24. The "Davidson Report" valued K & K's stock at less than $1.00 per share for the purposes of sales to K & K's ESOT when the corporation had a liquidation value of over $10.00 per share.

the fairness of negotiations in a determination that the agreement in question is itself fair. *In re: General Motors Engine Interchange Litigation, supra.*

CONCLUSION

It is easy to sympathize with the desire of the Court of Appeals to terminate the proceedings below, given the fact that such proceedings are often protracted, but that desire does not justify the decision below. As this Court said in *TMT Trailer:* "The need for expedition. . . . is not a justification for abandoning proper standards." *TMT Trailer, supra,* at 413. For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

/S/RICHARD L. NOBLE

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August 11, 1986

APPENDIX

APPENDIX A

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: A & C PROPERTIES, a Joint Venture and the Consolidated Cases, *Bankrupts.*	No. 76-02940-RM APPLICATION TO COMPROMISE CONTROVERSY WITH K&K PROPERTIES INC., WILLIAM KANE, BARBARA KELLY, KANE & KELLY ASSOCIATES, INC., AND OTHERS

GILBERT ROBINSON alleges:

1. He is the duly qualified and acting Trustee in Bankruptcy herein.

2. Applicant trustee ("Applicant"), by this Application, seeks approval by this court of his execution and performance of that certain Settlement Agreement, a copy of which is attached hereto to Exhibit "A" and incorporated herein by this reference. Said Settlement Agreement is hereinafter called "the 1982 Compromise." This Application seeks to explain portions of the 1982 settlement as relate to the bankruptcy estate. In order to avoid repetition of the contents of Exhibit "A", references will be made, where possible, to that Exhibit. In the event of any inconsistency between the description of the Agreement as set forth in this Application, and the Agreement itself, the terms of the Agreement are and should be deemed to be controlling.

3. The above-named debtor and 17 other entities each filed petitions in this Court for relief under Chapter XI of the Bankruptcy Act on August 19, 1976. They are hereinafter referred to in the singular. On October 13, 1978, all such cases were consolidated for all purposes. On September 10, 1979, the debtor was adjudged bankrupt. The bankrupt consolidated entities are hereinafter described as "Bankrupt" or "A & C". Applicant was appointed trustee effective that date, immediately qualified and has continuously thereafter served as trustee in bankruptcy.

4. On the date when the Chapter XI cases were originally filed, the principal tangible asset of the then Chapter XI debtors in the aggregate was 80,030 shares of K & K Properties Inc., a Delaware corporation ("K & K"). The balance of issued and outstanding shares thereof, 20,000 shares, were owned of record on said date by William Everett Kane ("Kane") and Barbara J. Kelly ("Kelly"). The principal assets of K & K were real property and notes and other instruments receivable evidencing a right to proceeds of sale or lease of real property. Disputes arose concerning the rights of the debtors, creditors and others in connection with the original transaction wherein property was transferred by the debtor entities to K & K Properties Inc., and claims were asserted against K & K, Kane and Kelley, on various theories including allegations that the properties so conveyed to K & K constituted voidable transfers to K & K (and to Kane and Kelly, insofar as their stock value in K & K was thereby allegedly enhanced without equivalent consideration.)

5. On or about December 21, 1977, during the pendency of the Chapter XI cases, prior to the appointment of the Trustee, a settlement agreement was entered into by and between the debtors, K & K, Kane, Kelly and others ("1977 Compromise"). This compromise was approved after a hearing, on notice, with participation by various parties. A copy of said 1977 Compromise Agreement is attached as an Exhibit to Exhibit "A" (the 1982 Compromise").

6. The 1977 Compromise purported, among other things, to effect various releases, other accommodations, and the transfer to K & K by Kane and Kelly of 3,000 shares of their common stock of K & K. Additionally, Kane and Kelly agreed to and did in fact "cede" to K & K 2,000 additional shares of their stock, subject to return to them in the event of occurrence of certain conditions subsequent. Thus, upon consummation of the Compromise, if the ceded shares were retained by K & K and cancelled, the estate would have owned 84.2%, and Kane and Kelly would have owned 15.7% of the issued and outstanding stock of K & K. Thereafter, a 20 for 1 stock split was effected. Henceforth

stock amounts and percentages will be discussed in terms of the post-split numbers, irrespective of the dates described.

7. Reference is made to Articles I,C-O inclusive of Exhibit "A", which specify in detail the salient historical events, actions, contentions and claims giving rise to the disputes resolved by the 1982 Compromise. Each is incorporated herein by this reference as if set forth in full. Further references thereto will be by paragraph number of the Agreement, Exhibit "A". E.g., Article I,F of the Agreement (Exhibit "A") wil be described herein as "Art. I,F".

8. Without limiting the generality of the foregoing, the trustee alleges that subsequent to approval of the 1977 Compromise and prior to adjudication of debtors as bankrupt, a series of disputes erupted between various creditors, K & K, Kane, Kelly and others. These included the disputes arising out of the 1977 Compromise (Art. I,E), the Adversary "D" litigation (Art. I,F), the Martin Superior Court litigation (Art. I,G) and the Marlin lawsuit (Art. I,H). Further disputes existed concerning funding of the K & K Employee Stock Ownership Plan ("ESOP") for the benefit of the K & K Employee Stock Ownership Trust ("ESOT") to the extent of contributions of $65,000 by K & K to the ESOP, which thereupon used said funds to purchase 104,839 shares from the corporation at an average price per share of $0.62. Moreover, disputes existed concerning the recapture by Kane and Kelly of the 40,000 ceded shares by reason of the claimed failure of performance by the debtor of certain obligations in connection with the settlement. Further disputes existed between certain parties including William Martin and K & K, Kane and Kelly, concerning the preparation and promulgation of the 1978 prospectus, and the approval of the 1977 Compromise itself, it having been alleged that the same was procured by reason of certain material misrepresentations and/or omissions of disclosure.

9. Subsequent to appointment and qualification of the trustee, he investigated the status of the various disputes, and the status of the principal asset of the estate, to wit, his stock in

K & K Properties Inc. He ascertained that there were other potential disputes and problems. These included, *inter alia*, the assertion by K & K, Kane, Kelly, the alleged voting trustee and others, that the bankruptcy trustee was not entitled to vote the shares of stock of K & K Properties Inc., by reason of a purported voting trust. This position, which was asserted not only by the voting trustee, but by K & K through its then management, Kane, Kelly and Kane and Kelly Associates, in litigation financed by K & K, is more fully described in Article I,D. The trustee has alleged that he entered into an agreement and understanding with K & K, Kane, Kelly, and Associated, with respect to a maintenance of the *status quo ante bellum* between the date of his appointment and the ultimate resolution of his rights to vote the stock. The trustee's disputes with K & K, Kane, Kelly, Associates, et al. in this connection are detailed in Article I,L. Subsequent to the declaration of the Superior Court that the trustee was entitled to vote said shares, and the transfer of said shares on the books of K & K, a new board of directors was elected for K & K, being the slate of independent, disinterested directors approved by this Court in an order made after a hearing on notice to all creditors. The new directors are hereinafter referred to as "independent directors". After a period of time in which they investigated into the situation as it related to K & K, said independent directors joined with the trustee in substantially all of the allegations and assertions made by him. These included:

A. Kane and Kelly, during their tenure as management of K & K and K & K itself, asserted that the trustee was pursuant to the 1977 settlement, obliged to see that the litigation described as adversary "D" was dismissed. Plaintiff therein asserted that the trustee was obligated to intervene in and prosecute said action. Kane and Kelly retook the "ceded" 40,000 shares by reason of provisions of the 1977 Compromise which they alleged justified such action. (See Article I,F.) They have demanded that the trustee procure a dismissal of the Martin Superior Court litigation pursuant to the terms of the 1977 Compromise.

B. It appeared that the causes of action described in Article I,H as the "Marlin litigation", might vest in the trustee on behalf of the debtor estates, giving rise to claims that the A & C estate owned all or part of the shares of stock whose ownership had theretofore been confirmed in Kane and Kelly by reason of the 1977 Compromise. Such claim was expressly released in the 1977 Compromise. Thus said 1977 Compromise stands as an impediment to such claims by the trustee. It has been contended that the 1977 Compromise is voidable. Kane and Kelly alleged, in addition to disputing such contentions on the merits, that they would have to be made whole if such assertions are correct, and the Compromise rescinded, in that the shares of stock previously transferred by them to K & K pursuant to the 1977 Compromise would have to be returned, and other compensation provided. The trustee, in his turn, alleges that it appears that K & K has been damaged by actions of Kane, Kelly, et al., including but not limited to various disputes arising with respect to the nature and quality of their management of the property of K & K and the consideration paid to them therefor. The independent directors joined in certain of these assertions.

C. Disputes have arisen in connection with certain post-Bankruptcy actions by Kane and Kelly and Kane and Kelly Associates ("Associates"), while in control of K & K, in alleged contravention of the alleged *status quo* agreement, and in alleged violation of the best interests of K & K. These include causing new employment, management and indemnification agreements to be entered into by K & K with and in favor of Kane, Kelly, Associates and others (Article II). They also include causing execution by K & K of new management contracts providing for newly created termination benefits to be granted to PFL Inc., an Illinois corporation, managing certain properties of K & K in that state (Article IJ). The principals of PFL Inc. were and are Claude Nickell and Alvin Akins, each of whom was a director of K & K at the time said newly created termination benefits were provided their Illinois corporation. The trustee and the independent directors assert other acts of alleged mismanagment

and/or excessive compensation on the part of Kane, Kelly and/or Associates.

D. Trustee and the independent directors complain of the action of Kane, Kelly, et al., in causing to be contributed 104,839 shares of K & K stock to its ESOT for the fiscal year ended September 15, 1979, at a per share price of $0.62, believed to be substantially below market value. The trustee also questions the contribution of 10,000 shares during the fiscal year ended September 30, 1980 to said ESOT, valued at $0.80 per share.

E. The trustee and the independent directors also take strong exception to the transaction described in Article IM, whereby Kane, Kelly and Associates, during the "status quo" period, caused K & K to grant themselves expanded indemnification rights and, to secure and implement same, caused approximately $200,000 cash to be deposited in trust with and/or as security with general outside legal counsel for the benefit of Kane, Kelly, and Associates.

10. All of the assertions and contentions made by the trustee and herein described are disputed by Kane, Kelly, et al., who claim that the corporation is, additionally, indebted to them by reason of employment contracts and extensions and may be liable to them in damages by reason of alleged acts and conduct by K & K and its independent board of directors, all of which is disputed by said corporation and by the board of directors.

11. Applicant believes and alleges that disputes and litigation on the foregoing disputes has been, and will continue to be lengthy, increasingly expensive and perhaps ultimately damaging to the interests of creditors of this bankruptcy estate, whose hopes for recovery lie principally in the liquidation of the assets of, or sale of the stock of K & K. Litigation concerning K & K inevitably affects the ability of the trustee to sell his shares of stock, should he determine to do so. Said litigation can reasonably be expected to delay the objective of the proceedings, insofar as time and effort of the directors and officers, which ought to be aimed at realization for creditors, are consumed in litigation preparation

and disputes. Moreover, the trustee is eager to avoid the otherwise inevitable necessity of challenging the efficacy of this Court's order approving the 1977 settlement. Such challenge is necessary as to those claims purportedly released by the 1977 Compromise.

12. The proposed settlement is as set forth in Article I,I of Exhibit "A". In summary, its salient provisions are as follows:

A. **Preconditions.** The agreement requires occurrence of each of the following acts or events for effectiveness:

(i) Approval by this Court of this Application.

(ii) Entry of an order dismissing the Adversary D litigation.

(iii) Termination of the ESOP (this has now been accomplished).

(iv) Although the agreement becomes effective upon the occurrence of the aforesaid conditions, its eventual effectiveness in real terms (i.e., the events which are conditions precedent to obligations relative to the transfer of property, releases and the like) is conditioned upon two further events: (a) final dismissal of the Adversary D litigation and (b) finality of the order approving this Compromise. Should these conditions not be met, the Agreement may be or become rescinded and the parties restored to their respective pre-settlement rights and positions, except as otherwise specified in Article II, 1.7.1.

B. **Consideration Received by Estate.** The estate will receive the following consideration:

(i) Kane and Kelly will transfer or provide for transfer to the trustee of A & C Properties 90,000 shares of stock in K & K Properties, Inc., not including their interests in the ESOT, which they shall retain. The trustee believes, on a liquidation evaluation, that the pre-tax value of these shares may exceed $1,000,000.

(ii) Kane and Kelly and Associates will resign as officers of K & K. They will agree to continue to serve as directors for the same compensation paid by K & K to its other shareholder

director (Gilbert Robinson, Trustee). Said trustee is not compensated by K & K.

(iii) All remaining indemnity funds, approximating $160,000, will be delivered to K & K, except as provided in Article II, 3.1. A portion of the returned funds will be held by K & K to fund defense of any appeals from orders dismissing the Adversary D proceedings as therein stated.

(iv) General releases limited to known claims will be received by K & K, the trustee and the board of directors of K & K from Kane, Kelly, Associates and others, which releases will include claims for breach of the alleged employment and indemnity agreements.

C. **Consideration Received by Kane, Kelly, et al.** The principal consideration received by Kane, Kelly, et al., will be as follows:

(i) Releases of the claims described in the Agreement at Article II,5.1.2.

(ii) Retention of the right to claim limited indemnification from K & K pursuant to its bylaws and stated law, but not pursuant to any agreements concerning indemnity and further limited to 85% of the amounts to which entitled, if any. (See Article II, 5.2.1.)

(iii) Dismissal of Adversary Proceeding D and the trustee's best efforts to procure dismissal of the Martin state court litigation.

13. Based upon all of the foregoing, the trustee recommends approval of the 1982 Compromise after a hearing is held upon notice to creditors and others entitled thereto. A copy of a proposed notice is filed herewith.

WHEREFORE, Applicant prays that the Court approve this Compromise and for such other and further relief as is just.

DATED: January 26, 1982.

DANNING, GILL, GOULD & JOSEPH

By /s/ DAVID A. GILL
DAVID A. GILL
Attorneys for Trustee

APPENDIX B

SETTLEMENT AGREEMENT

THIS AGREEMENT ("Agreement") is hereby made and entered into as of January 6, 1982, by and among the following parties:

1. K & K Properties, Inc., a Delaware Corporation ("Corporation")
2. Gilbert Robinson, as Trustee in Bankruptcy for A & C Properties et al. ("Trustee")
3. William Kane, an individual ("Kane")
4. Barbara Kelly, an individual ("Kelly"), and
5. Kane & Kelly Associates, Inc., a California Corporation ("Associates").

I. RECITALS

A. Organization and Inception of Corporation. Corporation was orginally organized under Delware law on December 17, 1975, by Kane and Kelly. In January, 1976, 18 joint ventures and limited partnerships ("A & C Entities") transferred to Corporation substantially all of their assets, subject to certain related liabilities and encumbrances which in some instances were assumed by Corporation ("Inception Assets"), in exchange for approximately 80% fo the issued and outstanding shares of Corporation ("Inception Transfers").

B. Current Business Activities of Corporation. Corporation presently is actively engaged in the following operating business activities:

(1) Operation and maintenance of 3 Texas apartment complexes, located in Forth Worth and Carrollton, Texas;

(2) Operation and maintenance of 2 office buildings located in Midland, Texas;

(3) Operation and maintenance of 2 office buildings located in Washington, D.C.; and

(4) Operation and maintenance of 2 industrial mini-warehouses located in Bensenville, Illinois.

C. Chapter XI Proceedings and Bankruptcy of A & C Entities; Issuance of 1978 Prospectus; Appointment of Trustee. On or about August 19, 1976, each of the A & C Entities filed petitions for arrangements under Chapter XI of the Bankruptcy Act, in the United States Bankruptcy Court for the Central District of California ("Bankruptcy Court").

In connection with the solicitation of consents from Class C creditors to a "Seventh Amended Plan of Arrangement" in said Chapter XI proceedings, a certain Prospectus of K & K Properties, Inc., dated August 29, 1978 ("1978 Prospectus"), was prepared and disseminated.

On October 13, 1978, the 18 individual Chapter XI cases of the A & C Entities were consolidated by the Bankruptcy Court, *sub nom* In Re A & C Properties et al., Case No. 76-02940.

On September 10, 1979, all proposed plans of arrangement having failed of confirmation, the Bankruptcy Court adjudged the A & C Entities to be bankrupt and appointed Gilbert Robinson as Trustee in Bankruptcy for the A & C Entities. Trustee has served in such capacity at all times since September 10, 1979.

D. Voting Trust and Extension; Voting Trust Litigation. In May, 1976, prior to the commencement of the said Chapter XI proceedings, the A & C Entities and Corporation entered into a certain Supplemental Voting and Dividend Trust Agreement ("Voting Trust"), whereby the A & C Entities agreed to transfer their collective shares of Corporation, comprising approximately 80% of all outstanding shares, to a voting trustee to be selected by the Advisory Committee of Corporation, consisting of the Board of Directors and 22 delegates from the A & C Entities ("Advisory Committee"). No institutional trustee had been installed as of August, 1976, and the Advisory Committee thereafter proceeded to act as voting trustee and to vote the said shares, pursuant to the terms of the Voting Trust instrument.

The Voting Trust provided that it would expire on May 12, 1979, subject to possible extension by the beneficiary A & C Entities until no later than May 12, 1981. In March, 1979, Investors Replacement, Inc., a California Corporation

("I.R.I."), acting as successor general partner and joint venture manager of the A & C Entities, executed an Entension of Supplemental Voting and Dividend Trust ("Voting Trust Extension"), which purported to extend the term of the Voting Trust until May 12, 1981.

In December, 1979, the Trustee in Bankruptcy brought an action in the Bankruptcy Court against Corporation, the Advisory Committee, and I.R.I. in order to contest the validity and effectiveness of the creation, extension and administration the Voting Trust and to assert that the Trustee in Bankruptcy was entitled to all voting and other rights in and to the said shares. In March, 1980, the Bankruptcy Court ruled that the Trustee in Bankruptcy was entitled to exercise all voting and other rights in and to the said shares. Corporation and the Advisory Committee filed a notice of appeal from the ensuing Bankruptcy Court Order. Corporation and Trustee have subsequently executed a stipulation to dismiss said appeal.

As of May 12, 1981, all issues relating to the Trustee's rights with respect to said shares became mooted, since the Voting Trust Extension expired by its terms on said date. In a related action in the Los Angeles County Superior Court, Case No. C308493, entitled *K & K Properties, Inc.* v. *Gilbert Robinson, Trustee, and Advisory Committee*, an order was entered on June 4, 1981, directing that full ownership, voting and all other rights in and to said shares be transferred to Trustee. Following Trustee's assumption of full control of said shares, a new majority of Corporation's Board of Directors has been elected.

E. 1977 Compromise. On December 21, 1977, the Bankruptcy Court approved and confirmed a Settlement Agreement ("1977 Compromise") which had been entered into by and among Corporation, Kane, Kelly, the A & C Entities, and certain other parties. Said Settlement Agreement, a copy of which is attached hereto as Exhibit A, encompassed in pertinent part the following provisions:

(1) Kane and Kelly unconditionally surrendered 60,000 shares to Corporation;

(2) Kane and Kelly conditionally surrendered an additional 40,000 share to Corporation. Relevant conditions included the following: (a) the dismissal with prejudice of certain pending outside litigation; (b) the delivery of acceptable general releases to Corporation, Kane and Kelly from the outside litigants, their attorneys and certain other persons; (c) the undertaking of the A & C Entities to intervene in any similar litigation which might thereafter be commenced, as the real parties in interest, for purposes of obtaining a dismissal; and (d) as a condition subsequent, said 40,000 shares were subject to revert to Kane and Kelly if similar litigation were commenced prior to November 30, 1981 and no dismissal thereof was secured within 90 days.

(3) The delivery of general releases from the A & C Entities in favor of Corporation, Kane and Kelly, and

(4) Corporation would lend to the A & C Entities up to $100,000 in order to enable the A & C Entities to prosecute certain claims against third parties.

F. Adversary "D" Litigation. On June 19, 1979, an action entitled *William M. Martin et al., Plaintiffs,* vs. *William E. Kane et al., Defendants* was filed in the Bankruptcy Court as Case No. 76-02940(RM) "D" ("Adversary "D" Litigation"). Said action filed by and on behalf of one of the former outside litigants who had delivered releases to Corporation, Kane and Kelly under the 1977 Compromise, seeks to invalidate the 1977 Compromise on the basis of alleged fraud and misrepresentation concerning the Inception Transfers: specifically, concerning the true value of the Inception Assets as of January, 1976, and the existence of an "oral agreement" between Kane and Marlin. Said action also seeks recovery of damages based upon alleged errors, omissions and misrepresentations in the 1978 Prospectus.

Pursuant to the terms of the 1977 Compromise, Kane and Kelly have heretofore demanded that Trustee seek to intervene in said action for purposes of causing its dismissal. Trustee has not complied with said demand. In February, 1980, Kane and Kelly demanded that Corporation return to them the 40,000 shares

which had been conditionally ceded to Corporation under the 1977 Compromise. Corporation complied with such demand. Trustee contends that Kane and Kelly were not so entitled to the return of such shares.

C. **Martin Superior Court Cross-Complaint.** As a result of the filing of the Adversary D Litigation, Corporation, Kane and Kelly had filed a complaint in the Los Angeles County Superior Court, entitled *K & K Properties, Inc., et al., Plaintiffs* vs. *William Martin et al., Defendants*, Cases No. C279852. Said complaint alleges, in pertinent part, breach of contract and fraud on the part of the Plaintiffs in the Adversary D Litigation, and others, for having filed the Adversary D Litigation in violation of the terms of releases which had been issued in connection with the 1977 Compromise.

In turn, the Defendants in the Superior Court have filed a cross-complaint against Corporation, Kane and Kelly ("Martin Cross-Complaint"), alleging that the within Complaint was filed merely for purposes of harassment, and otherwise reasserting generally the allegations of the Adversary D Litigation.

H. Marlin Lawsuit. On June 19, 1979, Barry Marlin filed an action in the Los Angeles County Superior Court, entitled *Barry S. Marlin* vs. *K & K Properties, Inc., et. al.*, Case No. C288636 ("Marlin Lawsuit"). Said action alleges that Marlin and Kane had made an oral agreement relating to the approximately 20% stock interest retained by Kane and Kelly in Corporation, whereby Kane had agreed to hold two-thirds of such stock in trust for Marlin and also to pay to Marlin the sum of $3,000 per month for an indefinite term.

I. Associates Management Services Agreement and Extension. On June 1, 1977, Corporation entered into a Management Services Agreement with Associates (then a general partnership but later incorporated), whereby Associates agreed to provide the services of Kane and Kelly as President and Secretary, respectively, for a term of 3 years, expiring on May 3, 1980 ("Associates Management Services Agreement"). Aggregate compensation thereunder (allocated 70% to Kane and 30% to

Kelly) was set at $95,000 for the first year, $105,000 for the second year and $115,000 for the third year (subject to semi-annual cost of living adjustments), plus incentive compensation equal to 10% of certain "adjusted ordinary net profits." Said Management Services Agreement included provisions for group medical and life insurance protection, use of an executive automobile, a hold harmless from Corporation in favor of Associates for any acts other than willful misconduct, and an option in favor of Associates to purchase certain designated computer equipment for book value upon termination.

On June 1, 1980, the then Board of Directors and Associates caused said Management Services Agreement to be amended and extended for an additional 3 years, until May 31, 1983 ("Associates Management Services Agreement Extension"). The principal amendments related to fixing the annual base compensation at $100,000 per year (allocated 60% to Kane and 40% to Kelly) and limiting the possible additional incentive compensation to a maximum of $150,000 per year. As partial consideration for the execution of said Extension, Associates waived certain claims for deferred compensation in the amount of $156,000, which had been called for under the Associates Management Services Agreement.

J. P.F.L. Management Agreement and Extension. P.F.L., Inc. ("P.F.L.") is an Illinois corporation which is wholly owned by Claude Nickell and Alvin Akins, who were formerly directors of Corporation. On or about October 1, 1977, Corporation and P.F.L. entered into a certain Management Agreement ("P.F.L. Management Agreement") whereby P.F.L. was retained until September 30, 1980, as the leasing and managing agent for Corporation's two Bensenville, Illinois mini-warehouses, at a fee equal to 5% of gross rentals collected. As of October 1, 1980, said Management Agreement was renegotiated and extended ("P.F.L." Management Agreement Extension"). Said Extension specifies that if Corporation terminates the services of P.F.L. within 36 months from and after October 1, 1980, P.F.L. shall be entitled to a lump-sum termination award equal to the product of

$1,000 times the difference between 36 and the number of months during which said Extension was in force.

K. Employee Stock Ownership Plan ("ESOP") and Trust ("ESOT"). In March, 1978, the Board of Directors authorized the adoption and implementation of an ESOP and its associated ESOT. The purpose of the ESOT is to invest in Corporation's stock for the benefit of Corporation's employee-participants. All full-time employees who meet certain minimum age and length of service requirements are eligible to participate. Employer (Corporation) contributions are allocated to the respective accounts of individual participants on the basis of proportionate covered compensation. A participant's interest in his ESOT account vests at the rate of 10% per year. In the event of death, retirement or a break in service, a participant is entitled to receive a distribution of all or a part of the Corporation stock held in his account.

Corporation has the right to terminate the ESOP and ESOT, either fully or in part; in the event of such termination, any affected participant will be entitled to receive a distribution of all stock allocated to his respective account, whether or not such stock was theretofore fully vested. Any Corporation stock distributed by the ESOT to participants is subject to (1) participant's right to require that Corporation repurchase such stock for cash at its then current fair market value and (2) Corporation's right of first refusal in the event of any contemplated sale to a third party.

The Board of Directors is authorized to determine annually the current level of employer contributions to the ESOT, provided that the minimum contribution for any year must be sufficient to permit the ESOT to pay its current obligations and the maximum contribution for any year cannot exceed the amount currently deductible by Corporation under applicable income tax laws.

For its fiscal year ended 9/30/79, Corporation contributed $65,000 to the ESOT, which thereupon used said funds to purchase 104,839 shares from Corporation, at an average price per share of $0.62.

For its fiscal year ended 9/30/80, Corporation contributed 10,000 shares of its stock to the ESOT and valued such shares for income tax purposes at $0.80 per share.

The respective per-share prices for which the ESOT acquired its shares from Corporation were based upon valuations rendered by Harold Davidson & Associates, Inc., a real estate research and investment counseling firm located in Los Angeles, California.

L. Certain Contentions of Trustee. Trustee contends that in October, 1979, an oral agreement and understanding was made between Trustee and the then members of Corporation's Board of Directors, whereby the status quo of Corporation would be maintained pending Trustee's anticipated assumption of voting control over approximately 78% of Corporation's outstanding stock.

Trustee contends that the following actions violated the terms of said oral agreement and understanding:

(1) The execution of the Associates Management Services Agreement Extension;

(2) The execution of the P.F.L. Management Agreement Extension;

(3) The return of the 40,000 ceded shares to Kane and Kelly, and

(4) The contribution of 10,000 shares to the ESOT for the fiscal year ended 9/30/80, at a per-share value of $0.80.

Trustee further contends that the ESOT's acquisition of 104,839 shares from Corporation for the fiscal year ended 9/30/79 was effected at per-share prices which were substantially below fair market value as of September 30, 1979, and, accordingly, that the ESOT has obtained such shares for an inadequate consideration.

M. Indemnification Agreements and Indemnity Funds. Indemnification of officers, directors, employees and others is expressly provided for in the By-Laws of Corporation, to the maximum extent allowable under the General Corporation Law of Delaware. Consistently with Delaware law, said By-Laws require, as a condition precedent to indemnification, that Corporation make a determination of the indemnitee's good faith and entitlement to corporate indemnification; provided, however, that

the Board of Directors may authorize Corporation to pay potentially indemnifiable expenses or liabilities in advance of such a determination, if the indemnitee undertakes to repay such advances to Corporation in the absence of an eventual determination of good faith and entitlement to indemnification.

Kane, Kelly, and Associates contend that they are additionally entitled to full indemnification by Corporation with respect to any acts not constituting willful misconduct, pursuant to the hold harmless provisions in the Associates Management Services Agreement and Extension as well as the provisions of the 1977 Compromise.

In May, 1980, pursuant to the foregoing sources of entitlement, the former Board of Directors caused Corporation's funds in the aggregate amount of approximately $200,000 to be deposited in trust or as a retainer with general outside legal counsel for Corporation and outside legal counsel for certain former Directors who had been named as parties to some or all of the litigation described hereinabove, as well as other litigation ("Indemnity Funds"). A portion of such Indemnity Funds has heretofore been expended for legal fees incurred by Kane, Kelly and certain former Directors. The currently outstanding balance of such Indemnity Funds is now being held by the following law firms: Hill Wynne Troop & Meisinger—approximately $116,000 (as of November 5, 1981); and Dolman Wolfe & Linden—approximately $46,000 (as of December 31, 1981).

N. Areas of Disagreement and Disputes Encompassed by this Agreement; Contentions and Claims of Parties. Trustees and Corporation contend that certain claims, grievances and/or causes of action (whether actual, potential theoretical, contingent or otherwise) exist in favor of Trustee and/or Corporation against Kane, Kelly, and/or Associates (and certain other persons and entities) with respect to each of the following issues which are encompassed by this Agreement:

(1) The validity, effect, establishment and administration of the Voting Trust and the Extension thereof; and the Voting Trust litigation;

(2) Matters arising from or relating to the litigation described in Recitals F, G, and H hereof;

(3) The validity, fairness, interpretation and performance of the 1977 Compromise;

(4) The preparation and promulgation of the 1978 Prospectus, with respect to the completeness and accuracy thereof;

(5) The creation and funding of the ESOP and ESOT; and, in particular, the propriety and validity of share purchases by and share issuances to the ESOT, and the valuations upon which such transactions were based;

(6) The creation and implementation of indemnification agreements purporting to protect officers, directors and employees of Corporation, and others; and the propriety of the deposit and expenditure of the Indemnity Funds;

(7) The propriety, validity and effectiveness of the Associates Management Services Agreement and the Extension thereof; and Corporation's claimed right to terminate said Extension, pursue its legal remedies, and/or seek damages for the breach or failure of performance thereof; and

(8) The propriety, validity and effectiveness of the P.F.L. Management Agreement and Extension thereof.

Kane, Kelly, and Associates, and each of them, deny that any impropriety whatsoever has been committed by them with respect to any matter referred to in this Agreement.

0. Issued and Outstanding Shares of Corporation as of 12/1/81. As of December 1, 1981, Corporation had a total of 2,055,439 issued and outstanding shares, which were held of record as follows:

Shareholder	Number of Shares	% of Issued and Outstanding Shares
Trustee	1,600,600	77.87%
Associates	300,000	14.60
ESOT	105,906	5.15
Kane and Kelly, individually	40,000	1.95
Former ESOT participants (ex-employees)	8,933	0.43
	2,055,439	100.00%

As of 12/1/81, the Corporation stock held by the ESOT was allocated among the accounts of employee-participants as follows: (Fractional shares are rounded to the nearest number.)

Employee & Location	Vested Shares	Non-Vested Shares	Total Shares
William Kane, Monterey, Cal.	9,420	29,271	38,691
Barbara Kelly, Monterey, Cal.	4,285	14,335	18,620
Carla Hudson, Monterey, Cal.	2,744	10,130	12,874
Anne Tewksbury, Monterey, Cal.	458	2,577	3,035
Ginger Richards, Monterey, Cal.	199	1,795	1,994
Michael Murphy, Monterey, Cal.	238	2,141	2,379
(The above employees are hereinafter referred to as the "Monterey Group.")			
Subtotals for Monterey Group	17,344	60,249	77,593
Don Eierman, Washington, D.C.	2,355	8,093	10,448
Michael Nmagu, Washington, D.C.	817	2,762	3,579
Robin Smith, Washington, D.C.	80	717	797
Corbin Davis, Fort Worth, Texas	1,520	5,133	6,653
Harry Ward, Carrollton, Texas	842	2,969	3,811
Paula Nodwell, Midland, Texas	212	1,905	2,117
Marjorie Landry, Midland, Texas	91	817	908
Totals	23,261	82,645	105,906

II. AGREEMENT

NOW, THEREFORE, with particular reference to the foregoing recitals and in consideration of the mutual promises and commitments hereinafter set forth, the parties hereto agree as follows:

SECTION 1

DEFINITIONS AND TERMS: TIMING

1.0 *Scope and Effect of Section 1.* This Section sets forth and defines certain important terms and concepts employed in this Agreement. Significantly, this Section is intended to and does have both procedural and substantive effects upon the rights and duties of the parties hereto. Certain additional terms used in

this Agreement have heretofore been defined or explained in the preceding Recitals.

1.1 *Execution Date.* January 6, 1982.

1.2 *Approval Date.* The earliest date as of which all Interim Conditions (defined in Section 1.3) have been satisfied.

1.3 *Interim Conditions.* The occurrence of each of the following events shall be a condition precedent to the continued implementation of this Settlement Agreement:

1.3.1 *Entry of Bankruptcy Court Order Approving This Agreement.* The Bankruptcy Court in the consolidated A & C Entities proceeding shall have entered a written Order approving this Agreement and authorizing Trustee to proceed. For purposes of satisfying the Interim Conditions, said Order need not constitute a final or non-appealable order; however, as described in Section 1.7, the ultimate conclusiveness of this Settlement Agreement is conditioned upon the eventual finality of said Order. Said Order shall specify that:

(a) This Agreement is approved;

(b) Trustee's continuing performance hereunder is authorized;

(c) This Agreement is binding upon Trustee and the A & C Entities, as well as any successor-in-interest to and any claimant by or through Trustee and/or the A & C Entities;

(d) All parties to this Agreement, and their respective successors-in-interest, are authorized to do all acts and to execute all documents necessary or appropriate to the implementation and consummation of this Agreement; and

(e) All parties to this Agreement, for themselves and for their respective successors-in-interest, consent to the summary, *in personam* jurisdiction of the Bankruptcy Court with respect to any matters relating to the interpretation, construction and/or enforcement of this Agreement;

(i) Provided, however, that such consent to the summary, *in personam* jurisdiction of the Bankruptcy Court

shall be specifically limited to matters relating to the interpretation, cosntruction and/or enforcement of this Agreement and shall not extend to any other matters.

1.3.2 *Entry of Bankruptcy Court Order Dismissing Adversary "D" Litigation.* The Bankruptcy Court in the consolidated A & C Entities proceeding shall have entered a written Order dismissing with prejudice the Adversary "D" Litigation (as well as the predecessor Adversary "B" Litigation, if and to the extent still pending). For purposes of satisfying the Interim Conditions, said Order need not constitute a final or non-appealable Order; however as described in Section 1.7, the ultimate conclusiveness of this Settlement Agreement is conditioned upon the eventual finality of said Order.

1.3.3 *Termination of ESOP.* The ESOP and ESOT shall have been completely or partially terminated by Corporation in a manner which will result in (i) the full vesting of all shares allocated to the respective ESOT account of the Monterey Group as of September 30, 1981 and (ii) the subsequent distribution of such fully vested shares to the respective members of the Monterey Group in accordance with the provisions of the "K & K Properties, Inc. Stock Bonus and Employee Stock Ownership Plan."

1.3.3.1 *General Releases To Be Issued by Members of Monterey Group Other Than Kane and Kelly, As a Condition Precedent to Termination of ESOP.* As a condition precedent to Corporation's termination of the ESOP and ESOT in the manner specified in Section 1.3.3 hereof, each of the following persons shall have executed and delivered to Corporation their respective Complete General Releases, in the form attached hereto as Exhibit B, in favor of, *inter alia*, Corporation, Trustee, Kane, Kelly and Associates, and effective as of the date of termination of the ESOP and ESOT pursuant to Section 1.3.3 hereof: Carla Hudson, Michael Murphy, Anne Tewksbury, and Ginger Richards.

1.4 *Pre-Closing Automatic Rescission Date.* 30 days after the date on which any Interim Condition becomes objectively

impossible of satisfaction, the Agreement shall automatically be rescinded. Thereupon, all parties hereto shall be restored insofar as practicable to their respective rights and positions which existed on the Execution Date; provided, however, that in no event shall any termination of the ESOP and ESOT be rescinded, nor shall Kane and/or Kelly be restored to their former positions as officers of Corporation.

1.5 *Elective Rescission Date.* If all Interim Conditions have not been satisfied on or before June 30, 1982, any party hereto may thereafter elect to rescind this Agreement. Such rescission will become effective 30 days following written notice to all other parties. Thereupon, all parties hereto shall be restored insofar as practicable to their respective rights and positions which existed on the Execution Date; provided, however, that in no event shall any termination of the ESOP and ESOT be rescinded, nor shall Kane and/or Kelly be restored to their former positions as officers of Corporation.

1.6 *Closing Date.* Subject only to the conditions subsequent specified in Section 1.7, this Settlement Agreement shall be concluded on the Closing Date, which date shall in all events occur within 45 days after the Approval Date. On or before the Closing Date, the respective parties hereto, as obligated hereunder, shall have caused the completion of all conveyances, transfers and exchanges and the delivery to the respective parties or other persons entitled thereto of all instruments, shares, guarantees, releases, related or ancillary agreements, and all other documents necessary or incident to the consummation of this Settlement Agreement.

1.7 *Conditions Subsequent to Closing Date: Finality of Respective Orders Approving This Agreement and Dismissing Adversary "D" Litigation.* The eventual finality (i.e., non-appealability) or both the Order referred to in Section 1.3.1 (approval of this Settlement Agreement) and the Order referred to in Section 1.3.2 (dismissal of the Adversary "D" Litigation) shall be an essential condition of the continued effectiveness and ultimate conclusiveness of this Settlement Agreement.

1.7.1 *Effective of Non-Finality of Either the Order Approving This Agreement or the Order Dismissing the Adversary "D" Litigation.* Thirty days after the date on which either the entry of a final, non-appealable Order approving this Settlement Agreement or the entry of a final, non-appealable Order dismissing the Adversary "D" litigation becomes objectively impossible of occurrence, this Settlement Agreement shall be automatically rescinded. Thereupon, all parties hereto shall be restored insofar as practicable to their respective rights and positions which existed on the Execution Date; in particular, but without limitation thereby, all releases theretofore issued pursuant to Section 5 shall be rescinded retroactively to the Closing Date; provided, however, that (i) in no event shall any termination of the ESOP and ESOT be rescinded, (ii) nor shall Kane and/or Kelly be restored to their former positions as officers of Corporation, and (iii) the disposition of Indemnity Funds shall nevertheless continue to be controlled solely by the provisions of Section 3 of this Agreement.

SECTION 2

ACTIONS REQUIRED AS OF EXECUTION DATE: DUTIES AND RIGHTS OF PARTIES

2.0 As of the Execution Date, the respective parties hereto shall forthwith proceed to act in the manner specified in this section.

2.1 *Resignations of Kane and Kelly as Officers of Corporation.* As of the Execution Date, Kane and Kelly shall permanently resign their respective positions as officers of Corporation. During the time interval, if any, between the Execution Date and the date on which the ESOP and ESOT are terminated by Corporation as provided in Section 1.3.3, Kane and Kelly shall each continue as active employees of Corporation and shall each receive compensation therefor in the amount of $1,000 per month (pro-rated on a daily basis for any period less than a full month). As of the beginning of the day immediately following the date on

which the ESOP and ESOT are terminated by Corporation as provided in Section 1.3.3 hereof, Kane and Kelly shall each cease to be active employees of Corporation; thereafter, neither Kane nor Kelly shall be entitled to receive any compensation from Corporation with respect to subsequent services, unless otherwise hereafter agreed in writing by Corporation and Kane and Kelly. Until the Closing Date, however, Kane and Kelly shall each remain available to perform, and shall perform, such consulting services on behalf of Corporation as may from time to time be reasonably requested by Corporation's Board of Directors, with the mutual understanding that the rendition of such consulting services may be reasonably scheduled by Kane and Kelly so as not to interfere unduly with their other commitments or activities. Kane and Kelly shall be entitled to reimbursement by Corporation for all reasonable expenses incurred by them in connection with the performance of such consulting duties.

2.1.1 If this Settlement Agreement is rescinded pursuant to any of the provisions of Section 1.4, 1.5, or 1.7.1, the said resignations of Kane and Kelly shall have been without prejudice to any possible rights of Kane, Kelly, and/or Associates under the Associates Management Services Agreement or Extension thereof.

2.1.2 If the conditions specified in Section 1.7 are satisfied and this Settlement Agreement is finally consummated, the Associates Management Services Agreement and Extension thereof (as well as any other contracts between Corporation and Kane, Kelly, and/or Associates which may have been in existence prior to the Execution Date) shall be terminated retroactively to the Execution Date, except as specified in Section 3 hereof.

2.1.3 Any payments made to Kane, Kelly, and/or Associates pursuant to this Section 2 shall be without prejudice to Corporation's right to contend (i) that it is otherwise under no obligation to pay any compensation to Kane, Kelly, and/or Associates and (ii) that it is entitled to recover any sums previously paid to Kane, Kelly and/or Associates.

2.1.4 The within resignations of Kane and Kelly shall in no event be deemed a breach by Kane, Kelly or Associates of any provision of the Associates Management Services Agreement or Extension thereof; nor shall Kane, Kelly or Associates be required to furnish replacements for Kane and/or Kelly, as otherwise provided in the Associates Management Services Agreement or Extension.

2.2 *Trustee's Duties as of Execution Date.* Within 20 days following the Execution Date, Trustee (at the expense of the Bankruptcy Estate of the A & C Entities) shall cause such actions to be taken as may reasonably be necessary or appropriate in order to accomplish the following objectives: (1) The issuance of an Order of the Bankruptcy Court in conformity with the provisions of Section 1.3.1 hereof; and (2) the dismissal of the Adversary "D" Litigation as specified in Section 1.3.2 hereof. No later than 45 days following the Approval Date, Trustee shall cause to be filed a Motion in the Los Angeles County Superior Court to intervene in and dismiss with prejudice the Martin Cross-Complaint.

2.2.1 *Trustee's Actions Re Bankruptcy Court Approval of Agreement.* The hearing thereon shall be held following notice to interested parties and otherwise in accordance with the Bankruptcy Act and Rules. Trustee shall use his best efforts to secure an Order in conformity with the provisions of Section 1.3.1 hereof.

2.2.2 *Trustee's Actions Re Adversary "D" Litigation.*

(a) The hearing thereon shall be held following notice to interested parties and otherwise in accordance with the Bankruptcy Act and Rules. Trustee shall use his best efforts to secure an Order in conformity with the provisions of Section 1.3.2 hereof.

(b) If such a dismissal is ordered and any appeal from the resulting Order of the Bankruptcy Court is thereafter perfected, Trustee shall elect either to defend said appeal himself or to require that Kane and Kelly defend said appeal. In

either case, the party defending said appeal shall be reimbursed by Corporation for reasonable attorney's fees in connection therewith; provided, however, that if Trustee elects to require that Kane and Kelly defend said appeal, such reimbursement shall be payable solely out of the Indemnity Funds, and in accordance with the provisions of Section 3 hereof.

2.2.3 *Motion Re Martin Cross-Complaint.*

(a) Trustee shall file a motion to intervene for purpose of dismissal of the Martin Cross-Complaint, and Trustee shall appear at the hearing thereon and argue in favor of such result. Trustee shall have no further responsibilities in connection therewith.

(b) If said motion is denied, or if said motion is granted and any appeal from the resulting Order of the Superior Court is thereafter perfected, Kane and Kelly (at their sole expense) may undertake to prosecute or defend, as the case may be, any appeal thereon—provided that Kane and Kelly shall satisfactorily indemnify Trustee and Corporation from and against any liability in connection with such appeal.

2.3 *Corporation's Duties as of Execution Date.* At such time on or after the Execution Date as is determined by Corporation's Board of Directors to be appropriate—but in no event more than 20 days after all other Interim Conditions have been satisfied, and provided that the condition precedent specified in Section 1.3.3.1 hereof has occurred—Corporation shall cause the ESOP and ESOT to be terminated in the manner specified in Section 1.3.3 hereof.

SECTION 3

DISPOSITION OF INDEMNITY FUNDS

3.0. This Section governs the disposition of Indemnity Funds currently held by outside counsel as described in paragraph M of the Recitals hereto.

3.1. *Control and Use of Indemnity Funds From and After Execution Date.* As of the Execution Date, all Indemnity Funds

shall be held in interest-bearing accounts, and the interest earned thereon shall accrue and be added to the balance of outstanding Indemnity Funds which existed on the Execution Date. Until the earliest to occur of the Approval Date, the Automatic Rescission Date, and the Elective Rescission Date, said Indemnity Funds shall be disbursed only with the written consent of Corporation and only for the following purposes: (1) In connection with any appeal from an Order of the Bankruptcy Court dismissing the Adversary "D" Litigation, as provided in Section 2.2.2(b) hereof; and (2) an amount not in excess of $10,000 may be disbursed from said Indemnity Funds for reasonable attorney's fees incurred after November 5, 1981, by Kane, Kelly, and Associates in connection with the negotiation and implementation of this Settlement Agreement.

3.1.1 If this Agreement is rescinded prior to the Approval Date pursuant to the Automatic or Elective Rescission provisions hereof, Corporation and Kane, Kelly, and Associates shall reserve all rights existing on the Execution Date with respect to the Indemnity Funds.

3.2 *Control and Use of Indemnity Funds After Approval Date.* As of the Approval Date, the balance of all outstanding Indemnity Funds shall be returned forthwith to Corporation. Corporation shall thereupon apply such returned Indemnity Funds as follows:

(a) Any amount of such returned Indemnity Funds in excess of $50,000 shall be deposited to the general funds of Corporation and may be used by Corporation without restriction and for any purpose, in the sole discretion of Corporation;

(b) $50,000 of such returned Indemnity Funds shall be deposited by Corporation in a segregated, interest-bearing trust account. Disbursements from said trust account shall be made only for the purpose specified in Section 2.2.2(b) hereof. Upon finality of the Bankruptcy Court Order dismissing the Adversary "D" Litigation, any remaining balance of funds in said trust account shall be released to Corporation and may

thereafter be used by Corporation without restriction and for any purpose, in the sole discretion of Corporation.

3.2.1 If this Agreement is rescinded subsequent to the Approval Date pursuant to Section 1.7.1, any remaining balance of funds in said trust account shall be released to Corporation and may thereafter be used by Corporation without restriction and for any purpose, in the sole discretion of Corporation.

SECTION 4

ADDITIONAL DUTIES OF PARTIES

4.0. In addition to the obligations and responsibilities specified elsewhere in this Agreement, the respective parties hereto shall undertake the duties and responsibilities specified in this Section.

4.1 *Transfer of 90,000 Shares of Corporation's Stock By Associates to Trustee.* In consideration of Trustee's issuance or releases and Trustee's promises and commitments under this Agreement, Associates shall do the following acts between the Approval Date and the Closing Date:

(1) Associates shall deliver to the law firm of Hochman, Salkin and DeRoy, as escrow holder ("Escrow Holder"), share certificates representing 90,000 shares of the validly issued and outstanding shares of Corporation's stock, together with corresponding stock transfer powers duly endorsed on behalf of Associates in favor of Trustee. Associates shall execute irrevocable written escrow instructions alternatively directing the Escrow Holder to deliver said share certificates and stock transfer powers (together with any dividends received or receivable from and after the Closing Date with respect to such 90,000 shares) as follows:

(a) To Trustee, upon satisfaction of the conditions specified in Section 1.7;

(b) To Associates, if this Agreement is rescinded pursuant to Section 1.7.1;

(2) Associates shall deliver to Trustee an irrevocable proxy authorizing Trustee, in his sole discretion, to vote said 90,000 shares during the pendency of the said escrow.

(3) Associates shall irrevocably instruct Corporation to deliver to the Escrow Holder any dividend declared with respect to said 90,000 shares from and after the Closing Date and during the pendency of said escrow.

4.1.1 *Associates' Related Warranties to and Indemnification of Trustee.* With respect to the transfer of said 90,000 shares to Trustee, Associates make the following express warranties and agrees to indemnify Trustee against any and all loss or damage relating thereto, including reasonable attorneys' fees.

(1) That said 90,000 shares are validly issued and outstanding and are freely transferable to Trustee;

(2) That said 90,000 shares were not derived directly or indirectly from any shares ever owned or held by the ESOT;

(3) That Trustee, if said shares are eventually delivered to him, shall receive good title thereto and ownership thereof; and

(4) That said shares are entirely free of actual or potential claims of third parties, except as to such actual or potential claims which relate to the subject matter of this Agreement and of which Trustee presently has knowledge, including without limitation the pending litigation described in Recitals F, G, and H hereof.

4.1.2 *Related Personal Guarantees of Kane and Kelly.* Kane and Kelly shall each personally guarantee every obligation of Associates specified in Section 4.1 or Section 4.1.1.

4.1.3 *Acceptable Form of Related Instruments, Documents, Instructions and Personal Guarantees.* The form and contents of any instrument, document, written instructions, or personal guarantee specified in any of Sections 4.1, 4.1.1, and 4.1.2 shall be as mutually and reasonably determined by counsel for the respective parties hereto.

4.2 *Anti-Dilution Agreement.* From and after the Execution Date, neither Corporation nor Trustee shall take any action which would result in an involuntary and disproportionate reduction in the percentage ownership of Kane, Kelly and/or Associates in the stock of Corporation.

4.3. *Preservation of Directorships of Kane and Kelly.* For so long as Kane, Kelly and/or Associates collectively own at least 10% of Corporation's outstanding shares (and provided that shares owned by Associates shall be counted for this purpose only if Kane and Kelly control and majority of the voting power of Associates), Trustee agrees to vote his shares of Corporation's stock so as to cause each of Kane and Kelly to be elected as a shareholder member of Corporation's seven-member Board of Directors. As such directors, Kane and Kelly shall be entitled to receive same rate of compensation if any, as paid by Corporation to other shareholder-directors of Corporation. The within agreement of Trustee to so vote his shares extends only to Kane and Kelly, personally and individually, and does not inure to the benefit of any nominee or successor-in-interest of Kane and/or Kelly.

4.4 *Maintenance of By-Laws Indemnification Provisions.* During the pendency of this Agreement, Corporation shall not amend its By-Laws so as to restrict or deminish the scope of indemnification to which Kane and Kelly were entitled pursuant to such By-Laws as in effect on the Execution Date.

4.5 *Allocation of Duties to Obtain Necessary Actions, Documents or Other Items from Third Parties.*

(1) Kane, Kelly, and Associates shall have the duty to obtain any necessary documents or other items from and to cause any necessary actions to be taken by any of the persons or entities who shall receive releases under Section 5.1 (or any subsection thereof).

(2) Corporation and Kane, Kelly, and Associates shall have the joint duty of obtaining the required performance of third parties as to any matter not otherwise specifically allocated to one or more parties hereto.

SECTION 5

RELEASES

5.0 On or before the Closing Date, the parties hereto shall issue Releases to the persons and entities and in the manner specified in this Section. Said Releases shall be effective as of the Execution Date but shall be subject to recission, retroactive to the Execution Date, pursuant to Section 1.7.1. Provided that all such Releases shall be consistent with the express provisions of this Section, the form of such Releases shall be as herafter determined by mutual agreement between or among the respective counsel for the parties hereto.

5.1. *Special Releases to be Issued by Trustee and Corporation.* Trustee and Corporation shall each deliver their Special Releases, specifically limited to any and all claims arising out of the particular matters identified in Section 5.1.2. hereof, to each of the Releasees identified in Section 5.1.1 hereof.

5.1.1. *Identification of Releasees of Trustee and Corporation.*

(1) Kane

(2) Kelly

(3) Associates

(4) All former directors of Corporation, individually

(5) P.F.L., Inc.

(6) The officers of P.F.L., Inc., individually

—Provided, however, that the issuance of Releases to or by any or all of the persons and entities specified in (4), (5), and (6), immediately above, pursuant to this Section 5, shall be waivable at the election of Kane and Kelly.

5.1.2 *Matters as to which the Special Releases of Trustee and Corporation Shall Apply.* The Special Releases to be issued by Trustee and Corporation shall be specifically limited to any and all claims or causes of action relating to or arising out of the following:

(1) The validity, effect, establishment and administration of the Voting Trust and the Extension thereof; and the Voting Trust litigation;

(2) Matters arising from or relating to the litigation described in Recitals F, G, and H hereof;

(3) The validity, fairness, interpretation and performance of the 1977 Compromise; in particular, Trustee shall acknowledge the binding effect of the 1977 Compromise;

(4) The preparation and promulgation of the 1978 Prospectus, with respect to the completeness and acuracy thereof;

(5) The creation and funding of the ESOP and ESOT; and, in particular, the propriety and validity of share purchases and share issuances to the ESOT, and the valuations upon which such transactions were based;

(6) The creation and implementation of indemnification agreements purporting to protect officers, directors and employees of Corporation, and others; and the propriety of the deposit and expenditure of the Indemnity Funds. The Special Releases to be issued by Trustee and Corporation shall specifically be extended to include all payments made pursuant to any indemnification agreement or obligation to any of the following law firms, and specifically including counsel who receive such payments: Dolman, Wolf & Linden; Hill Wynne Troop & Meisinger; Stutman, Treister & Glatt; and Van Kamp & Johnson.

(7) The propriety, validity and effectiveness of the Associates Management Services Agreement and the Extension thereof, and any known claims of mismanagement by Kane, Kelly and/or Associates; and

(8) The propriety, validity and effectiveness of the P.F.L. Management Agreement and Extension thereof.

5.2. *General Releases to be Issued by Kane, Kelly, and Associates in Favor of Trustee, Corporation, and Corporation's Present Board of Directors.* Kane, Kelly, and Associates, and each of them, shall issue their respective written general releases of any and all known claims or causes of action arising prior to the Execution Date, subject only to such exceptions as are set forth in Section 5.2.1 hereof, to each of Trustee, Corporation, and the

other members of the present Board of Directors of Corporation. Said general releases shall, in particular but without limitation thereby, relieve Trustee of any claimed duty to intervene in any action or litigation (whether now pending or hereafter commenced), except as otherwise expressly required by this Agreement.

5.2.1 *Exceptions to General Releases to be Issued by Kane, Kelly, and Associates.*

(a) Any rights of Kane, Kelly, and Associates, and/or obligations of Trustee and Corporation, created by this Agreement;

(b) Any claims which are unknown as of the Execution Date; and said general releases may specifically affirm reliance upon the provisions of California Civil Code § 1542; and

(c) Kane and Kelly shall specifically retain the right to claim limited indemnification from Corpoation, pursuant solely to the provisions of Corporation's By-Laws or applicable statutory law and limited to 85% of any indemnificable amounts otherwise allowable under said By-Laws or statutory law.

5.3. *Additional General Releases to be Issued in Favor of Trustee and Corporation.* Kane, Kelly, and Associates shall have the responsibility of securing and delivering to each of Trustee and Corporation, as of the Closing Date, written General Releases in favor of each of Trustee and Corporation from each of the persons or entities specified in Section 5.1.1 hereof.

Said additional Releasors shall generally release each of Trustee and Corporation from any and all claims or causes of action arising prior to the Closing Date, subject only to the following two exceptions: (1) Any rights or obligations created under this Agreement; and (2) said General Releases may specifically affirm reliance upon the provisions of California Civil Code § 1542.

This Section 5.3 shall have no application to any person or entity as to which Kane and Kelly elect to waive the issuance of releases pursuant to the final clause of Section 5.1.1.

SECTION 6

MISCELLANEOUS AND PROCEDUARAL PROVISIONS

6.0. *Suspension of Statutes of Limitation During Pendency of This Agreement.* If this Settlement Agreement is rescinded or otherwise terminated, the parties hereto agree that any applicable statutes of limitation (including the passage of time for purposes of the equitable defense of laches) shall have been suspended during the time interval commencing on the Excution Date and ending on the date of rescission or other termination of this Agreement, with respect to any rights, claims or causes of action which existed as of the Execution Date.

6.1. *No Warranties or Indemnification Concerning Tax Consequences.* No party hereto has made any warranty concerning the federal or state income tax consequences of the transactions specified in this Agreement; nor shall any party hereto indemnify any other party or parties with respect to such tax consequences.

6.2. *Non-Admission of Liability.* This Agreement and the claims which are the subject matter of the Releases contained herein effect the settlement and compromise of claims which are denied and contested. Nothing contained in this Agreement shall be construed as an admission or acknowledgment of or consent to liability or indebtedness by any party to any other party, and each party expressly denies any such liability or indebtedness.

6.3. *Applicable Law.* This Agreement and any other document referred to herein shall in all respects be interpreted, enforced and governed by and under the laws of the State of California, as applicable to instruments, persons and transactions which have legal contacts and relationships solely within the State of California.

6.4. *Entire Agreement.* This Agreement constitutes an integrated agreement containing the entire agreement and understanding among the parties hereto concerning the subject matter hereof. This Agreement sets forth all promises and inducements made by any party to any other party with respect to any of the subject matter hereof and supersedes all prior negotiations and proposed agreements. Each of the parties hereto acknowledges that its execution of this Agreement was not the result of any promise, representation or warranty by any other person or entity, except as specifically set forth in this Agreement. The parties hereto agree that parol evidence shall not be admissible for purposes of interpreting this Agreement or proving the existence of agreements, promises, representations or warranties collateral hereto.

6.5. *No Oral Modification.* This Agreement shall be effectively modified only by a writing which has been duly executed by each of the parties herto.

6.6. *Representation by Independent Legal Counsel.* The parties hereto acknowledge that they have been represented by independent legal counsel of their own selection throughout the negotiations which preceded the execution of this Agreement and that they have executed this Agreement with the consent and on the advice of such independent counsel.

6.7. *Notices.* All notices, demands or other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered to the respective parties at the following addresses, or at such other addresses as may hereafter from time to time be designated in accordance with the Notice provisions hereof:

(1) To Corporation:

Board of Directors of K & K Properties, Inc.
c/o Carl Albert, Esq.
Albert & Ellis
1801 Century Park East
Suite 2200
Los Angeles, California 90067

With a Copy to:

James V. Looby, Esq.
Hochman, Salkin & DeRoy
9100 Wilshire Boulevard
Seventh Floor—West Tower
Beverly Hills, California 90212

(2) To Trustee:

Gilbert Robinson, Esq.
Robinson, Wolas & Diamant
1888 Centruy Park East
Suite 900
Los Angeles, California 90067

With a Copy To:

David Gill, Esq.
Danning, Gill, Gould & Joseph
1801 Century Park East
Suite 1500
Los Angeles, California 90067

(3) To Kane:

William E. Kane
P.O. Box 22407
Carmel, California 93922

With a Copy to:

Louis Meisinger, Esq.
Hill Wynn Troop & Meisinger
10920 Wilshire Boulevard
Ninth Floor
Los Angeles, California 90024

(4) To Kelly:

Barbara Kelly
P.O. Box 22407
Carmel, California 93922

With a Copy to:

Louis Meisinger, Esq.
Hill Wynne Troop & Meisinger
10920 Wilshire Boulevard
Ninth Floor
Los Angeles, California 90024

(5) To Associates:

Kane & Kelly Associates, Inc.
P.O. Box 22407
Carmel, California 93922

With a Copy to:

Louis Meisinger, Esq.
Hill Wynne Troop & Meisinger
10920 Wilshire Boulevard
Ninth Floor
Los Angeles, California 90024

6.7.1 Any such notice, demand or other communication shall be deemed to be given on the date actually delivered if delivered in person; four days following the date deposited in the United States Mail, if mailed by certified or registered mail; or on the date of actual receipt, if otherwise delivered, as the case may be.

6.8. *Further Assurances.* Each of the parties hereto covenants and agrees to do such further acts and things and to execute and deliver such documents and instruments as reasonably may be required to effectuate this Agreement.

6.9. *Counterparts.* This Agreement may be excuted in one or more counterparts, each of which shall be deemed an original and all of which, taken together, shall constitute a single instrument.

6.10. *Binding on Successors.* This Agreement shall both bind and inure to the benefit of the respective parties hereto as well as their respective successors-in-interest, of whatsoever kind or nature.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by themselves or by their duly authorized representatives as of the date first written above.

K & K PROPERTIES, INC.,
A DELAWARE CORPORATION

By .....
(On behalf of the Board of Directors)
("Corporation")

.....
Gilbert Robinson, as Trustee in Bankruptcy for A & C Properties et al.
("Trustee")

.....
William Kane
("Kane")

.....
Barbara Kelly
("Kelly")

KANE AND KELLY ASSOCIATES, INC.,
A CALIFORNIA CORPORATION

By .....
William Kane, President
("Associates")

APPENDIX C

Objections Nos. 4, 5, 8, 9, 11, and 12 of Robert E. Mosher and William W. Martin to Application to Compromise Controversy with K & K Properties, Inc., William Kane, Barbara Kelly, Kane & Kelly Associates, Inc., and Others

COME NOW, WILLIAM W. MARTIN and ROBERT E. MOSHER, both individually and as managing agents of the Legal Action Committee for Marlin Investments (hereinafter "Objectors") and, as and for, their Objections to the proposed Settlement Agreement, referred to in Exhibit "J" attached hereto and incorporated by reference herein for identification (the "Agreement"), allege as follows:

Creditor Status

William W. Martin ("Martin") has filed Proofs of Claim herein totalling over $38,000 and has alleged therein the debtor-creditor relationship which exists between himself and the bankrupt estates in these preceedings. As a creditor of these estates, Martin is a party in interest herein and has standing to object to the proposed Agreement.

Robert E. Mosher ("Mosher") has filed Proofs of Claim herein totalling over $54,000 and has alleged therein the debtor-creditor relationship which exists between himself and the bankrupt estates in these proceedings. As a creditor of these estates, Mosher is a party in interest herein and has standing to object to the proposed Agreement.

The Legal Action Committee for Marlin Investments is an unincorporated association of some four hundred (400) Creditors of the estate formed in 1976 to preserve and protect their interests in such estates and the shares of K & K exchanged therefore and to pursue legal actions against Kane, Kelly, K & K, Marlin and other individuals and entities. Its members claims on file against the estate herein total over nine million dollars ($9,000,000). Mosher and Martin are managing agents of that committee and can act in its behalf herein.

Fourth Objection

Valuable rights belonging to the Trustee which were a matter of indifference to the corporation, such as those relative to the questions of who owned shares and whether certain prior transactions constituted frauds upon this Court, were surrendered after the responsibility for negotiating and drafting the final Agreement with the K & K parties devolved upon the counsel for the corporation, as described in Exhibits "A" and "B" attached hereto and incorporated by reference herein. An impermissible delegation of duties occurred when formulation of the final Agreement devolved on such counsel. Although a certain commonality of interests existed among the parties negotiating with K & K parties, and no question is raised regarding their integrity and good faith, a conflict was inherent in the described delegation.

Although the argument may be made that such delegation promoted efficiency, the fairest way of achieving a goal sometimes is not the most efficient one. Fairness here demanded the absence of actual or potential conflicts.

Fifth Objection

The preceding Objection is incorporated by reference herein.

It is apparent from Exhibit "B" that terms of the Agreement were tailored to conform with the desires and exigencies of the independent majority of the Board of Directors of K & K. Those Directors, as indicated therein and as a matter of corporate law, are primarily charged with operation of the corporation. They had no concern with the question of whether the K & K parties or the estates own the shares of the corporation. As one result of the foregoing, the matter of the ESOP shares was determined on the basis of corporate considerations which are inimical to the interests of the Estates:

> "With respect to the ESOP, although the independent majority of the board of directors viewed the previous contributions to and purchases of corporate stock by the

> ESOP as having been based upon substantial undervaluations, there simply was no particularly attractive solution to the problems of dealing with the ESOP. Rights and legitimate expectations had been created in favor of "innocent" employee-participants; the Department of Labor and the Internal Revenue Service had acquired concurrent jurisdiction over the ESOP; the previous fundings of the ESOP had been based upon ostensibly independent appraisals, which were perhaps arguably within some permissible order of magnitude; it did not appear that any complete rescission of the ESOP would be feasible; and any termination of the employment services of Mr. Kane and Ms. Kelly prior to the full vesting of all of their allocated ESOT shares, would result in any forfeited shares being allocated to the accounts of the remaining ESOP participants rather than being returned to the corporation. For each and all of the foregoing reasons, the ESOP issue was handled as provided in the Settlement Agreement. As you know, the ESOP was completely terminated as of January 6, 1982, by action of the board of directors on said date—with the attendant result that all shares of corporate stock allocated to all participants' accounts became fully vested as of said date."
>
> Exhibit "B", page 4, lines 1-29.

Accommodation of purely corporate interests resulted in the vesting of improperly obtained shares of K & K in Kane and Kelly.

It is unfair to have severely prejudiced the interests of creditors by vesting grossly undervalued shares, not only in the hands of Kane and Kelly but in others (thereby creating further dilution), on the basis of corporate convenience. Certain of the legal and factual conclusions expressed above appear to be quite tentative and to express only the tax advice of corporate counsel. Since the total number of shares involved in the ESOP is over one hundred thousand (100,000), a number which, by the Trustee's own estimate (See: Application, page 9, line 25, through page 10, line 3), would have a present value of well over one million dollars ($1,000,000), it would be inequitable to allow such an asset to be lost without an exhaustion of all possibilities, including the obtaining of a "second opinion."

Also, it should be noted that, since a one million dollar ($1,000,000) figure has been highlighted in the Application's discussion of Kane and Kelly's "transfer . . . to the trustee of A & C Properties [of] 90,000 shares of stock of K & K Properties" (Application, page 9, lines 26-27), equal prominence should be given to the sacrifice involved in not unwinding the ESOP transaction. The principles of both equity and full-disclosure appear to demand it.

Eighth Objection

Paragraph 4.2 of the Agreement provides that: "From and after the Execution Date, neither Corporation nor Trustee shall take any action which would result in an involuntary and disporportionate reduction in the percentage ownership of Kane, Kelly and/or Associated in the stock of Corporation." Agreement, page 17.

This is grant of pre-emptive rights which contravenes the Corporations Codes of both Delaware and California (if applicable to K & K as nominally foreign corporation), which require such rights be contained in articles of incorporation. Furthermore, it involves a change in the rights, preferences and privileges of the outstanding shares of K & K since some (Kane's and Kelly's) have been granted such rights while others obviously have not. Such a change requires a permit from the Department of Corporations and, so far as the objectors are aware, none has been obtained. Cal. Corp. Code §§ 204(a); 406; 25103(8); Del. Corp. Code § 102(b)(3).

While one can understand Kane's and Kelly's concern about dilution, since they had systematically diluted the Trustee's interest by making purchases through the ESOP at a small fraction of the shares' true value, it is most difficult to understand what justification can be offered for this provision. Granting them this special privilege—especially in light of the Trustee's stated views regarding their past conduct—is manifestly unfair.

This provision is further objectionable because it is nowhere mentioned in the Notice of (so far as Objectors are able to

determine) in the Application. A shareholders' right which is so fundamental that it is required to be part of a corporate charter, as opposed to a by-law or shareholder agreement, certainly should have been pointed out with great clarity.

Ninth Objection

The Agreement also provides another special privilege for Kane and Kelly with respect to their voice in the management of K & K. In its pertinent part, Sub-section 4.3 states:

> "For so long as Kane, Kelly and/or Associates collectively own at least 10% of Corporation's outstanding shares (and provided that shares owned by Associates shall be counted for this purpose only if Kane and Kelly control a majority of the voting power of Associates), Trustee agrees to vote his shares of Corporation's stock so as to cause each of Kane and Kelly to be elected as a shareholder member of Corporation's seven-member Board of Directors."
>
> Agreement, at page 17.

Absent this provision, their shares could elect only one director. Unlike the pre-emptive rights provision objected to above, their special privilege is mentioned in the Notice, albeit in passing.

In addition to the fact that it is of doubtful validity under applicable law, this provision is objectionable because it is manifestly unfair. The consistently obstructionist conduct of Kane and Kelly since the appointment and qualification of the Trustee has been detailed in the Application (page 4, line 25 through page 5, line 24) and is well known to this Court. The Objectors surmise that a sheer sense of frustration in dealing with them may have contributed to the Trustee's acquiescence to a fatally flawed Agreement. It is, therefore, counter-productive to give them a disproportionate voice in the affairs of the corporation.

Eleventh Objection

The Agreement is unfair to the creditors in that it does not rest upon a careful valuation of the varied and numerous claims

against Kane and Kelly which were surrendered. Neither the Notice nor the Application provides the creditors with information sufficient to enable them to make an independent evaluation of those claims.

Twelfth Objection

Even if all of the eleven objections set forth above could be resolved—which they manifestly cannot under the existing Agreement, Application and Notice—a basic question would remain: Does the Agreement, stripped of its other problems, constitute a fair exchange?

The claims which would be surrendered include, but are not limited to the following:

(1) *Waste and Mismanagement*

The estates originally owned eleven (11) additional properties which were sold during the last six (6) years for a net of some seven million four hundred thousand dollars ($7,400,000). See: Exhibit "I" attached hereto. Of this amount, only notes having a value of approximately two million dollars ($2,000,000) remain in the corporation. Although Kane and Kelly would doubtless argue that the entire amount went for maintenance and repairs, that is clearly not the case.

Hundreds of thousands of dollars were expended prior to the designation and qualification of the Trustee in legal fees defending Kane and Kelly's positions and stock ownership interests. Substantial sums were thereafter spent to delay the Trustee's obtaining control of K & K for a period of nearly two years.

As an independent director familiar with real estate can testify, there was substantial waste and mismanagement in K & K. A year of operation under new management will show the extent of that waste and the possible *extent* of any claim for mismanagement. The fact that there has been mismanagement is a known claim and, Kane and Kelly will argue, is within the scope of the Special Releases.

Direct salaries of at least two hundred-fifty thousand dollars ($250,000) per year, plus other benefits, were paid to Kane and Kelly through the date of the Agreement, including, but not limited to the two year period in which corporate funds were utilized to resist the Trustee.

The applicable data developed by the Trustee during his incumbency and by the independent directors since their election is not available to the Objectors. However, on the basis of such information as is available to them and their counsel, it is fair to say that a substantial and *known* waste and mismanagement claim exists which would easily exceed one million dollars ($1,000,000) and could exceed two million dollars ($2,000,000), absent any claim for punitive damages.

(2) *Kane's and Kelly's Shares*

(a) On several occasions, Barry S. Marlin has testified that two thirds (⅔) of the shares originally held by Kane and Kelly were, in fact, held by them as his nominees. An action is pending regarding those shares which, using the Trustee's valuation, would be worth over three million dollars ($3,000,000).

(b) If the Compromise is set aside, the entire Kane and Kelly ownership interest is potentially recoverable because the theory underlying the settled actions i.e., that the shares were acquired through fraud for insufficient consideration is viable. The total value of the shares recovered would exceed four million five hundred thousand dollars ($4,500,000).

(c) The Objectors incorporate by reference their discussion of the ESOP shares set forth above.

(3) *Claim Against Former Directors of the Corporation*

Virtually unnoticed in the focus on Kane and Kelly is the fact that the former Directors of K & K manifestly did not discharge their fiduciary duties. Some or all of the direct corporate waste is chargeable to them.

The foregoing list is not intended to be exhaustive and the dollar amounts have been stated in deliberately conservative

terms. Also, because they have no *direct* dollar value, no mention is made of dismissal of the Martin allegations of fraud on the Court—an allegation sufficiently serious in nature that it can be considered on the Court's own motion.

As noted above in the third objection, the one million dollars ($1,000,000) received from Kane and Kelly is largely illusory. They have simply been returned to the ownership interest which they had (approximately 15%) prior to the appointment and qualification of the Trustee and the various maneuvers that they went through in the more than two year interregnum between that date and the date of the Agreement. Furthermore, there has been further dilution in the estates' interest through the vesting of ESOP shares in third parties so that the Trustee controls fewer shares than he was entitled to upon qualification.

The Objectors grant the fact that Kane and Kelly have been terminated, but the power to fire them rested with the Board since it was reconstituted. It is doubtful that anyone will argue that the "Management Services Agreement" under which they were compensated could be accorded any great value in a settlement given the fact that it was entered into contrary to an express understanding with the Trustee well after the date when, by all rights, he was entitled to name the K & K Board of Directors and could have done so but for Kane and Kelly's resistance. Furthermore, no transaction between Kane and Kelly and their controlled board has been shown to be arms length.

So far as the avoidance of further litigation is concerned, it should be noted that most of the data required (other than that regarding the extent of mismanagement which the new Board may gather through experience) is in hand. Thus, no costly discovery is required.

The applicable law regarding fraud on the Court has been fully briefed and the facts have been fully developed. A *lengthy* trial on that question or a subsequent trial on the issue as to what shares Kane is entitled to once the Compromise is set aside is unlikely. Similarly, the ESOP question is unlikely to require

substantial trial time. Furthermore, pursuit of such actions by the Trustee cannot affect corporate affairs.

Only the mismanagement question is somewhat vexatious, but even that need not be so. Even if it is limited to obvious matters such as clearly excessive expenditures, which are now known, in the interest of expedited treatment, the potential recovery is impressive.

APPENDIX D

(LETTERHEAD)

February 1, 1982

BY MESSENGER

Richard L. Noble, Esq.
Noble, Campbell & Uhler
523 West Sixth Street
Suite 440
Los Angeles, California 90014

Re: K & K Properties, Inc/Settlement Agreement
Dated January 6, 1982

Dear Mr. Noble:

On behalf of K & K Properties, Inc., Carl Albert has requested that I relate to you some additional background information concerning the Settlement Agreement which was executed on January 6, 1982.

1. **Valuation of Corporate Assets.** Enclosed herewith as Exhibit 1 is a copy of certain valuation data covering all corporate assets and reflecting an aggregate value of $20,771,207, as of August 31, 1981. This valuation is based primarily upon the February, 1981 appraisals completed by Lake Michigan Appraisal Company, a subsidiary of Arthur Rubloff & Company, as adjusted to August 31, 1981.

In the context of the extended settlement discussions and negotiations, the valuation data contained on Exhibit 1 was generally viewed as representing the lowest end of the reasonable range of pre-tax corporate liquidation values. In particular, the Rubloff appraisal valuation of the Austin-Estrada notes ($1,658,000) was regarded as unrealistically low; it was generally agreed that the realistic fair market value of the Austin-Estrada notes was approximately 2.4 million dollars.

At the other end of the valuation spectrum, an aggregate value of approximately $25 million has been regarded as the highest pre-tax liquidation value of the corporate assets.

2. **Background Information Concerning Settlement Negotiations.** Settlement negotiations among the respective parties were actively pursued for approximately 10 months prior to the execution of the present Settlement Agreement. Originally, serious negotiations were conducted principally by David Gill, Esq., on behalf of the Trustee in Bankruptcy, and Louis Meisenger, Esq., on behalf of Mr. Kane, Ms. Kelly and Kane & Kelly Associates, Inc. In November, 1981, our firm was retained to represent the corporation in negotiating and drafting a comprehensive settlement plan. During the months of November and December, 1981, extensive negotiations were held in which all of the respective parties, their respective counsel and all of the members of the corporation's board of directors actively participated. Several different conceptual approaches to an overall settlement plan were intensively discussed and reviewed. In some instances, such settlement plans were embodied in proposed draft form. For example, a proposed settlement arrangement based upon a so-called tax-free split-off (whereby the corporation would form a new subsidiary to which it would transfer the Austin-Estrada notes and the Bensenville and O'Hare warehouses, followed by an exchange of all of the subsidiary's stock for all of the K & K stock (including fully-vested ESOP shares) owned by Kane, Kelly, Associates, and the Monterey employee-participants of the ESOP) was very carefully considered but, unfortunately, was ultimately aborted because of income tax complications relating to the transfer of the Austin-Estrada notes. Also, an in-kind redemption of all of the Kane, Kelly, and Associates stock in exchange for specific corporate properties was considered and rejected because of income tax consequences.

I want to assure you that the final Settlement Agreement was vigorously and methodically negotiated and renegotiated, at all times in an arm's-length context. In particular, counsel for the Trustee in Bankruptcy and counsel for Mr. Kane, Ms. Kelly, and

Associates maintained an adversarial posture throughout the settlement discussions and negotiations.

From the perspective of the corporation, the following aspects of the Settlement Agreement assumed primary significance:

(1) The independent majority of the board of directors felt most strongly that an overall, comprehensive settlement of all issues and disputes was absolutely essential. This position was prompted by the following cogent considerations:

(a) The board of directors was predominantly spending its time in attempting to deal with the ongoing disputes among the parties, rather than in attempting to operate and control the corporate properties and businesses in the most efficient possible manner;

(b) The absolute dollar costs to the corporation for legal and other assistance relating to the ongoing conflicts and disputes were disproportionately high, and in the absence of an overall settlement it was anticipated that such future corporate expenses would be substantial;

(c) The independent majority of the board of directors believed that an immediate change of operating management control was necessary;

(d) For various reasons relating to the efficient operation of the corporation, a swift conclusion of the existing litigation involving the corporation was regarded as a highly desirable objective; and

(e) The return of the outstanding indemnification funds to the corporation's general accounts would be of significant advantage to the corporation.

(2) *The independent majority of the board of directors was convinced as to the validity of the contentions and claims against Mr. Kane, Ms. Kelly and Associates, as specifically set forth in paragraph N of the Recitals to the Settlement Agreement. Nevertheless, the independent majority of the board of directors regarded the culmination and implementation of the Settlement Agreement as in the overall best interests of the corporation, as*

compared to proceeding with continuing and additional litigation in pursuit of alternative remedies. [Emphasis added.]

(3) With respect to the ESOP, although the independent majority of the board of directors viewed the previous contributions to and purchases of corporate stock by the ESOP as having been based upon substantial undervaluations, there simply was no particularly attractive solution to the problems of dealing with the ESOP. Rights and legitimate expectations had been created in favor of "innocent" employee-participants; the Department of Labor and the Internal Revenue Service had acquired concurrent jurisdiction over the ESOP; the previous fundings of the ESOP had been based upon ostensibly independent appraisals, which were perhaps arguably within some permissible order of magnitude; it did not appear that any complete rescission of the ESOP would be feasible; and any termination of the employment services of Mr. Kane and Ms. Kelly prior to the full vesting of all of their allocated ESOP shares, would result in any forfeited shares being allocated to the accounts of the remaining ESOP participants rather than being returned to the corporation. For each and all of the foregoing reasons, the ESOP issue was handled as provided in the Settlement Agreement. As you know, the ESOP was completely terminated as of January 6, 1982, by action of the board of directors on said date—with the attendant result that all shares of corporate stock allocated to all participants' accounts became fully-vested as of said date.

Under the existing circumstances and in view of the various problems and difficulties recited above, the corporation believes that the Settlement Agreement of January 6, 1982 represents the best resolution possible (as distinct-from the best possible resolution) of many difficult and vexing problems. Certainly, the corporation hopes and anticipates that the Settlement Agreement will be approved by the Bankruptcy Court at its forthcoming hearing and that the Settlement Agreement will become final and conclusive as quickly as possible.

If I can supply any additional information, please let me know.

Very truly yours,
JAMES V. LOOBY

Exhibit 1

Current Value of All of Corporation's Assets

According to the Rubloff Appraisals, as of February, 1981, the net present fair market value (pre-tax) of Corporation's operating assets was as follows:

Washington, D.C. Office Buildings		
Colorado Building	5,274,000	
711 Building	3,595,000	$ 8,869,000
Midland, Texas Office Buildings		
C & K Petroleum Building	1,676,300	
Building of the Southwest	1,812,000	3,488,300
Texas Apartment Complexes		
Louis XIV	572,000	
Hurst Manor	1,318,700	
Estrada Carrollton	2,803,500	4,694,200
Bensenville, Illinois Warehouses		
Bensenville	450,650	
O'Hare	515,650	966,300
Total Appraised Value of Operating Properties as of 2/81		18,017,800
Appraised Value of Austin-Estrada Notes as of 2/81		1,658,000
Adjustment to Equity Value as of 8/31/81 for Mortgage Principal Payments Made Between 2/81 and 8/31/81		216,899
Total Appraised Value of Operating Properties and Austin-Estrada Notes, Adjusted to 8/31/81		$19,892,699

In addition to the assets included within the Rubloff Appraisals, Corporation owns the following assets, with values indicated as of 8/31/81:

Net Current Assets		
Current Assets	1,454,160	
Less: Current Liabilities	(1,013,382)	$ 440,778
El Estero Property (at market value) (Unimproved real property in Monterey, Cal.)		225,006
Notes Receivable		
Vogue Apartments	74,398	
Whitelake (AITD)	38,332	
A & C Entities (1977 Compromise Loan)	100,000	212,730
Total Value of Additional Assets as of 8/31/81		$ 878,508

Total Value of Corporation as of 8/31/81:

Operating Properties and Austin Estrada Notes (Per Rubloff Appraisal as Adjusted to 8/31/81)	$19,892,699
Total Value of Additional Assets	878,508
Total Value as of 8/31/81	$20,771,207

Based upon the foregoing premises, the total net pre-tax value of all of Corporation's assets as of August 31, 1981 (assuming that all assets had been sold for cash as of said date) was $20,771,207.

APPENDIX E

Excerpt from Reporter's Transcript of Proceedings Dated February 23, 1982, in connection with the Fairness Hearings

"MR. GILL: 'Your Honor, I'll be happy to lead off.

'The first matter on calendar deals with a matter which may render moot the various other items on calendar today.

'That has to do with the Application of the Trustee in Bankruptcy to compromise a controversy with the various parties who are mentioned therein.

'By way of a brief introduction, I'd like first of all to ask that the Court accept in evidence by reference each of the Bankruptcy Court pleadings described in the Application to Compromise and in the Settlement Agreement which is attached as an exhibit to the Application to Compromise.'"

"THE COURT: 'Have you delineated the pleadings, Mr. Gill?'"

"MR. GILL: 'Yes, Your Honor.

'And I will submit in writing and serve upon all counsel a list of each document.

'I hope that we can identify them by document name and by filing date. And I will submit a written list of each counsel appearing today.'"

"MR. NOBLE: 'Will you repeat what—'"

"MR. GILL: 'Certainly.'

'I wish to introduce into evidence by reference each of the Court documents on file in this Court described in the Application, the compromise, and in the Settlement Agreement, including but not limited to the Application itself, and the Settlement Agreement which is —'"

"MR. NOBLE: 'But not for the facts therein obtained?'"

"MR. GILL: 'No. They can refer to those documents by document title and filing date and we will connect up with a lengthy exhibit at a later time.'"

"THE COURT: 'Thank you.'"

"MR. GILL: 'If that's agreeable.

'The Trustee desires to go forward with his Application. And from the standpoint of creating a legal context, it's the Trustee's belief that what must be established in order to sustain a compromise is essentially as follows:

'That there is a dispute, that the dispute is of a type which ought to be resolved by compromise, that the proposed compromise is in the best interest of creditors, and it is the best compromise which the Trustee was able and reasonably will be able to negotiate.

'Those are the issues which the Trustee intends to deal with in terms of the Application. And that is the framework in which we would propose to proceed.'"

"THE COURT: 'I think your Application states exactly that, Mr. Gill.'"

"MR. GILL: 'Thank you, Your Honor.

'I would then dispense with any other statement to be made and I'd like to call as our first witness Gilbert Robinson, the Trustee.'"

"THE COURT: 'Thank you.'"

"GILBERT ROBINSON, was thereupon called as a witness, and having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and testified as follows:"

"THE CLERK: 'Be seated in the witness stand and state your name and address.'"

"THE WITNESS: 'Gilbert Robinson.'"

"THE COURT: 'Your address, Mr. Robinson, unless you want to keep it secret.'"

"THE WITNESS: 'It's my phone number I keep secret, Judge. 1888 Century Park East, Los Angeles.'"

"DIRECT EXAMINATION"

"BY MR. GILL:

"Q. 'Mr. Robinson, what is your business or profession?'"

"A. 'I'm an attorney.'"

"Q. 'Do you have an area of specialty?'"

"A. 'Yes, insolvency, bankruptcy, trustee, receiverships.'"

"Q. 'How long have you served in those capacities?'"

"A. 'About 25 years.'"

"Q. 'Have you served on appointment in this Court?'"

"A. 'Yes.'"

"Q. 'An appointment in other courts?'"

"A. 'Yes.'"

"Q. 'Have you served as Trustee in operating businesses?'"

"A. 'Yes.'"

"Q. 'And in liquidation procedures?'"

"A. 'Yes.'"

"Q. 'And in reorganization cases?'"

"A. 'Yes.'"

"Q. 'Do you substantially limit your own personal practice to areas related to the fields you've just mentioned?'"

"A. 'Yes.'"

"Q. 'You are the Trustee in Bankruptcy in the matter captioned A & C Properties, et al.?'"

"A. 'I am.'"

"Q. 'When did you qualify as Trustee?'"

"A. 'I believe it was in September of 1979.'"

"Q. 'And since that qualification, you have continuously served as Trustee?'"

"A. 'I have.'"

"Q. 'Upon your appointment and qualification as Trustee, did you conduct any independent investigation as of that time into the various disputes and problems which are described in your Application to Compromise?'"

"A. 'Yes.'"

"Q. 'Would you explain to us briefly how you went about doing that and what you did?'"

"A. 'Well, initially after my appointment and qualification, I arranged through my counsel—I employed the firm of Danning, Gill and the other names that go thereafter.

'Then arrangements were made and we contacted everyone that we knew about involved in these cases who was interested and who was willing to meet with me and my attorney and discuss the problems.

'We met with many of the people in this room this afternoon, we met with well over 15 separate people, probably in excess of two dozen.

'We discussed the problems, the areas of difficulty, the status, the operations of the business, the assets, the background, the history, as much as we could learn from everyone who was willing to talk to us.

'We spent as much time as these people wanted to talk, and that started our initial introduction to this case.'"

"Q. 'Did you cause an investigation to be made into the facts that are mentioned in your Application to Compromise Controversy on file herein?'"

"A. 'After our initial discussions, I asked my counsel to investigate into each of the controversies and review the documents, contentions, so that we can decide what should be done.'"

"Q. 'Have you participated in discussions with your counsel and others with respect to these matters?'"

"A. 'Continuously.'"

"Q. 'Over a period of time commencing approximately September of 1979 until this date?'"

"A. 'That's correct.'"

"Q. 'You're familiar with the Application to Compromise which is on file?'"

"A. 'I am.'"

"Q. 'And the Settlement Agreement which is attached thereto?'"

"A. 'I am.'"

"Q. 'Did you participate in the negotiation of that agreement?'"

"A. 'I was—I participated in it, yes, in discussions with my attorney as to the negotiations that were ongoing, and on some

occasions I was present while some of the discussion was going on.'"

"Q. 'Have you had occasion to review a copy of that Application to Compromise today?'"

"A. 'Yes.'"

"Q. 'And did you have occasion to review a copy of the proposed agreement which is Exhibit A to that Application?'"

"A. 'Yes.'"

"Q. 'As to the contents of that Application, which you allege to be true, are those facts true to the best of your knowledge, information and belief?'"

"A. 'They are.'"

"Q. 'As to those items stated by you in that Applicaton to be contentions of yourself or other parties, to the best of your knowledge, information and belief, do those constitute contentions we have brought to your attention?'"

"A. 'I believe they do.'"

"Q. 'Would you testify to those facts with respect to each and every allegation contained in the Application and the Settlement Agreement?'"

"A. 'These are the facts as I know them and would so testify.'"

"MR. GILL: 'Your Honor, I believe that the Application and exhibits are already in evidence pursuant to the Court's ruling at the beginning of this hearing.'"

"BY MR. GILL:

"Q. 'Mr. Robinson, in your experience as a Trustee and an attorney, are the disputes which are mentioned in the Application and its exhibits of a type which ought to be resolved by settlement?'"

"A. 'Absolutely.'"

"Q. 'Why is that so?'"

"A. 'To use the words of one of the bankruptcy judges, if this matter is not resolved, most of the beneficiaries of my work will be dead.

'The problems we have, they're just very difficult problems. They're very complex.

'To resolve them will require lots of litigation, lots of expense, lots of lawyers' time.

'Much of the litigation or some of the litigation will be ongoing in the Superior Court, it will take four or five years for resolution, not to mention appeals.

'This case has been a litigious one, the costs involved in that kind of undertaking and the difficulties and the problems of the litigation and disputes are such that in my opinion if anyone's to get any benefit they should be settled, if that's at all possible.

'And I believe we have a settlement that makes sense, will avoid the time delays, will avoid the litigation, avoid the expenses, and that's why I have recommended that it be returned to the Court.'"

"Q. 'Do you believe that a failure to settle the case may also have some impact on the asset value of the estate for which you're responsible?'"

"A. 'Well, insofar as the costs and expenses of the litigation, in my opinion they will be very great. And there's, of course, no way of knowing what the final outcome of that litigation will be, there will be an impact.

'But, of course, I don't propose to project what the asset values of the estate will be five years from now or ten years from now when all of this litigation is finally resolved.'"

"Q. 'Are you satisfied that from your standpoint the settlement which has been ultimately reached was the best which could be reached under the circumstances?'"

"A. 'I believe it is.'"

"Q. 'Would you characterize the settlement negotiations, insofar as you are percipient thereto, as difficult and heated.'"

"A. 'I would say if there is an arm's length negotiation, this was an arm's length.

'I felt that all sides were very adamant in their advocacy for the protection of their clients.'"

"Q. 'Is it fair to say that there's substantial areas of disagreement as to fact and law between the other parties to the compromise?'"

"A. 'I believe that's the case.'"

"Q. 'Are you satisfied that the proposed settlement is in the best interest of the creditors?'"

"A. 'I certainly do.'" R.T. 927:21-936:16.

* * *

"Q. [By Mr. Noble:] 'Other than the fact that they took them back, did Kane and Kelly give the corporation anything for the 40,000 shares?'"

"A. 'Not that I'm aware of.

'Unless you're referring to what Kane and Kelly did as part of the 1977 statement.'"

"Q. 'No, I'm talking about what they just went and said we want our 40,000 shares back, there was no bargaining exchange then?'"

"A. 'If there was, I was not a party to it.'"

"Q. 'You're not aware of it today, I gather?'"

"A. 'I'm not.'"

"Q. 'Do you recall what the value of those shares was when they took them back?'"

"A. 'Mr. Noble, how do you value shares of this corporation?

'I don't know how to answer your question.'"

"Q. 'You have no educated guess as to what they were worth when they took them back?'"

"A. 'Mr. Noble, I don't know how you value shares in this corporation.

'There are many different formulas to use, many different approaches for the ESOT.

'I told you, on Page 7 of the settlement agreement they valued the shares at 62 cents. Is that the share you're looking for?

'The next paragraph on Page 7 says they valued for the ESOT purposes 80 cents a share. Is that the value you're looking for?'"

"Q. 'I'm looking for what they were really worth.'"

"A. 'I don't know what they were really worth.'" R.T. 957:16-958:21.

* * *

"BY MR. NOBLE:

"Q. 'Mr. Attenborough, what is your profession?'"

"A. 'I'm an attorney.'"

"Q. 'When were you admitted to practice?'"

"A. '1965'"

"Q. 'Are you familiar with ESOPs and ESOTs?'"

"A. 'Yes, I am.'"

"Q. 'Could you state for the Court your familiarity with ESOPs and ESOTs?'"

"A. 'I have worked in the field since 1969, beginning with developing the concept with Louis Kelso, and I have been involved in the installation of approximately 300 ESOTs, and my practice is devoted primarily to ESOTs.

'I'm also a CPA, and I have a master's of law degree in taxation.'"

"Q. 'Where is your master's in tax from?'"

"A. 'New York University.'"

"Q. 'Who is Louis Kelso?'"

"THE COURT: 'Who?'"

"BY MR. NOBLE:

"Q. 'Louis Kelso.'"

"A. 'Louis Kelso is the originator of the ESOT concept and, well, is clearly recognized as the originator of it. And, well, that's it.'" R.T. 1384:17-1385:15.

APPENDIX F

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: A & C PROPERTIES, a Joint Venture and the Consolidated Cases, *Bankrupts.*	In Bankruptcy No. 76-02940-RM

MEMORANDUM OF DECISION RE APPLICATION TO COMPROMISE CONTROVERSY

The above-entitled matter having been heretofore heard and submitted, this Court now finds and concludes that the above-mentioned Application To Compromise Controversy should be approved but that such approval shall specifically be without prejudice to the rights of the parties in the Adversary "D" litigation in "In re A & C Properties, Bankruptcy No. 76-02940-RM", or to the rights of the parties in pending litigation not before the Bankruptcy Court at this time.

Counsel for the Trustee will prepare, serve, and submit within five (5) days an order in accordance with the above, together with findings of fact and conclusions of law unless waived, as required by Rule 901 of the Rules of the United States Bankruptcy Court for the Central District of California and Rule 7 of the Rules of Civil Procedure for the United States District Court for the Central District of California.

DATED: June 18, 1982.

/s/ JOHN E. BERGENER
.....
JOHN E. BERGENER
Bankruptcy Judge

APPENDIX G

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW ON TRUSTEE'S APPLICATION TO COMPROMISE CONTROVERSY

1. Gilbert Robinson is the duly appointed, qualified and acting Trustee in bankruptcy in the matter of A & C Properties, a Joint Venture, into which bankruptcy case has been consolidated the matters of several other bankruptcies, to wit:

A & C PROPERTIES, A Joint Venture comprised of Brentwood Place Apartments, Ltd.; Embassy Apartments, Ltd.; Hurst Manor Apartments, Ltd.; Louis XIV Apartments, Ltd.; MBB, Ltd.; Rio Vista, Ltd.; SWB, Ltd.; Wedgewood Arms Apartments, Ltd.; Whitelake Manor Apartments, Ltd.; Westwood Horizons 73, a Joint Venture comprised of Aston, Ltd., Barkston, Ltd.; Colchester, Ltd.; Kennford, Ltd.; Preston, Ltd.; Seaton, Ltd.; Viscount, Ltd.; Limited Partnerships, Case No. 76-02940-RM

IAD JOINT VENTURE, a Joint Venture comprised of Exeter, Ltd.; Ramsgate, Ltd.; Redhill, Ltd.; Salisbury, Ltd.; Weatherby, Ltd.; Limited Partnerships, Case No. 76-11190-RM

SFO JOINT VENTURE, a Joint Venture comprised of Castleford, Ltd.; Dorchester, Ltd.; Lancaster, Ltd.; Liverpool, Ltd.; Maidenhead, Ltd.; Margate, Ltd.; Marlborough, Ltd.;

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON TRUSTEE'S APPLICATION TO COMPROMISE CONTROVERSY

1. Gilbert Robinson is the duly appointed, qualified and acting Trustee in bankruptcy in the matter of A & C Properties, a Joint Venture, into which bankruptcy case has been consolidated the matters of several other bankruptcies, to wit:

A & C PROPERTIES, A Joint Venture comprised of Brentwood Place Apartments, Ltd.; Embassy Apartments, Ltd.; Hurst Manor Apartments, Ltd.; Louis XIV Apartments, Ltd.; MBB, Ltd.; Rio Vista, Ltd.; SWB, Ltd.; Wedgewood Arms Apartments, Ltd.; Whitelake Manor Apartments, Ltd.; Westwood Horizons 73, a Joint Venture comprised of Aston, Ltd., Barkston, Ltd.; Colchester, Ltd.; Kennford, Ltd.; Preston, Ltd.; Seaton, Ltd.; Viscount, Ltd.; Limited Partnerships, Case No. 76-02940-RM

IAD JOINT VENTURE, a Joint Venture comprised of Exeter, Ltd.; Ramsgate, Ltd.; Redhill, Ltd.; Salisbury, Ltd.; Weatherby, Ltd.; Limited Partnerships, Case No. 76-11190-RM

SFO JOINT VENTURE, a Joint Venture comprised of Castleford, Ltd.; Dorchester, Ltd.; Lancaster, Ltd.; Liverpool, Ltd.; Maidenhead, Ltd.; Margate, Ltd.; Marlborough, Ltd.;

Teeside, Ltd.; Tettenhall, Ltd.; Waterford, Ltd.; Limited Partnerships, Case No. 76-11191-RM

PSP JOINT VENTURE, a Joint Venture comprised of Ajax, Ltd.; Brighton, Ltd.; Kendall, Ltd.; Kingston, Ltd.; Marston, Ltd.; Newbury, Ltd.; Northampton, Ltd.; Limited Partnerships, Case No. 76-11102-RM

DCA JOINT VENTURE, a Joint Venture comprised of Blackburn, Ltd.; Castleford, Ltd.; Dorchester, Ltd.; Lancaster, Ltd.; Liverpool, Ltd.; Maidenhead, Ltd.; Margate, Ltd.; Marlborough, Ltd.; Teeside, Ltd.; Widecomb, Ltd.; Limited Partnerships, Case No. 76-11193-RM

BENSENVILLE, LTD., a Limited Partnership, Case No. 76-11194-RM

BEL AIR, LTD., a Limited Partnership, Case No. 76-11195-RM

SOUTHWEST ASSOCIATES, a Joint Venture comprised of Willow Ridge, Ltd.; Booth Calloway, Ltd.; Carpenter, Ltd.; Altamesa, Ltd.; Sandy Lane, Ltd.; Bank Building, Ltd.; Southwest Associates, Ltd.; Loop 820, Ltd.; Limited Partnerships, Case No. 76-11196-RM

O'HARE, LTD., a Limited Partnership, Case No. 76-11197-RM

KNOLLWOOD HOUSE, LTD., a Limited Partnership, Case No. 76-11198-RM

MBB LTD., a Limited Partnership, Case No. 76-11199-RM

CIRCLE STAR, LTD., a Limited Partnership, Case No. 76-11200-RM

Teeside, Ltd.; Tettenhall, Ltd.; Waterford, Ltd.; Limited Partnerships, Case No. 76-11191-RM

PSP JOINT VENTURE, a Joint Venture comprised of Ajax, Ltd.; Brighton, Ltd.; Kendall, Ltd.; Kingston, Ltd.; Marston, Ltd.; Newbury, Ltd.; Northampton, Ltd.; Limited Partnerships, Case No. 76-11102-RM

DCA JOINT VENTURE, a Joint Venture comprised of Blackburn, Ltd.; Castleford, Ltd.; Dorchester, Ltd.; Lancaster, Ltd.; Liverpool, Ltd.; Maidenhead, Ltd.; Margate, Ltd.; Marlborough, Ltd.; Teeside, Ltd.; Widecomb, Ltd.; Limited Partnerships, Case No. 76-11193-RM

BENSENVILLE, LTD., a Limited Partnership, Case No. 76-11194-RM

BEL AIR, LTD., a Limited Partnership, Case No. 76-11195-RM

SOUTHWEST ASSOCIATES, a Joint Venture comprised of Willow Ridge, Ltd.; Booth Calloway, Ltd.; Carpenter, Ltd.; Altamesa, Ltd.; Sandy Lane, Ltd.; Bank Building, Ltd.; Southwest Associates, Ltd.; Loop 820, Ltd.; Limited Partnerships, Case No. 76-11196-RM

O'HARE, LTD., a Limited Partnership, Case No. 76-11197-RM

KNOLLWOOD HOUSE, LTD., a Limited Partnership, Case No. 76-11198-RM

MBB LTD., a Limited Partnership, Case No. 76-11199-RM

CIRCLE STAR, LTD., a Limited Partnership, Case No. 76-11200-RM

PARKWOOD, LTD., a Limited Partnership, Case No. 76-11201-RM

VOGUE, LTD., a Limited Partnership, Case No. 76-11202-RM

GOLDEN WEST, LTD., a Limited Partnership, Case No. 76-11203-RM

WH JOINT VENTURE, a Joint Venture comprised of Alchester, Ltd.; Belford, Ltd.; Coldfield, Ltd.; Knightsbridge, Ltd.; Pembridge, Ltd.; Staines, Ltd.; Viceroy, Ltd.; Limited Partnerships, Case No. 76-11204-RM

HOS JOINT VENTURE, a Joint Venture comprised of Alston, Ltd.; Dalmation, Ltd.; Keswick, Ltd.; Maidstone, Ltd., Southwell, Ltd.; Tiverton, Ltd., Limited Partnerships, Case No. 76-11205-RM

OLYMPIC JOINT VENTURE, a Joint Venture comprised of Andover, Ltd.; Kingsbridge, Ltd.; Limited Partnerships, Case No. 76-11206-RM

All of the entities identified in this paragraph are jointly and severally hereinafter described as the "A & C entities" or "Bankrupt".

2. The Trustee filed herein, on January 26, 1982, his Application to Compromise Controversy with K & K Properties, Inc., William Kane, Barbara Kelly, Kane & Kelly Associates, Inc. and others.

3. This Court approved and there was filed on January 26, 1982, a form of notice of Application to Compromise Controversy,

PARKWOOD, LTD., a Limited Partnership, Case No. 76-11201-RM

VOGUE, LTD., a Limited Partnership, Case No. 76-11202-RM

GOLDEN WEST, LTD., a Limited Partnership, Case No. 76-11203-RM

WH JOINT VENTURE, a Joint Venture comprised of Alchester, Ltd.; Belford, Ltd.; Coldfield, Ltd.; Knightsbridge, Ltd.; Pembridge, Ltd.; Staines, Ltd.; Viceroy, Ltd.; Limited Partnerships, Case No. 76-11204-RM

HOS JOINT VENTURE, a Joint Venture comprised of Alston, Ltd.; Dalmation, Ltd.; Keswick, Ltd.; Maidstone, Ltd., Southwell, Ltd.; Tiverton, Ltd., Limited Partnerships, Case No. 76-11205-RM

OLYMPIC JOINT VENTURE, a Joint Venture comprised of Andover, Ltd.; Kingsbridge, Ltd.; Limited Partnerships, Case No. 76-11206-RM

All of the entities identified in this paragraph are jointly and severally hereinafter described as the "A & C entities" or "Bankrupt".

2. The Trustee filed herein, on January 26, 1982, his Application to Compromise Controversy with K & K Properties, Inc., William Kane, Barbara Kelly, Kane & Kelly Associates, Inc. and others.

3. This Court approved and there was filed on January 26, 1982, a form of notice of Application to Compromise Controversy,

which was duly and timely mailed by the Clerk of the United States Bankruptcy Court to all entitled thereto pursuant to Bankruptcy Act Section 58a (11 U.S.C. § 94a).

4. No objections were timely made or entered except by and on behalf of Robert E. Mosher and William W. Martin.

5. The Trustee's Application sought to obtain authority for the Trustee to enter into and implement a settlement agreement, a copy of which is attached hereto as Exhibit "A" and incorporated herein by this reference. It is hereinafter described as the "Settlement Agreement". K & K Properties, Inc. has approved the Settlement Agreement by unanimous action of its Board of Directors.

6. Among the various disputes sought to be resolved is certain litigation described in the Settlement Agreement at paragraph 4F thereof, as the "Adversary 'D' litigaton", being a "Complaint for Declaratory Relief" filed on June 4, 1979 by William W. Martin as Plaintiff against Barbara Kelly, William E. Kane, K & K Properties, Inc. and Investors Replacement, Inc., Defendants. The Adversary "D" litigation has not been certified nor has plaintiff therein attempted to cause same to be certified as a class action under the Federal Rules of Civil Procedure or at all. Paragraph 13 of the complaint in the Adversary "D" litigation, however, recites

which was duly and timely mailed by the Clerk of the United States Bankruptcy Court to all entitled thereto pursuant to Bankruptcy Act Section 58a (11 U.S.C. § 94a).

4. No objections were timely made or entered except by and on behalf of Robert E. Mosher and William W. Martin.

5. The Trustee's Application sought to obtain authority for the Trustee to enter into and implement a settlement agreement, a copy of which is attached hereto as Exhibit "A" and incorporated herein by this reference. It is hereinafter described as the "Settlement Agreement". K & K Properties, Inc. has approved the Settlement Agreement by unanimous action of its Board of Directors.

6. Among the various disputes sought to be resolved is certain litigation described in the Settlement Agreement at paragraph 4F thereof, as the "Adversary 'D' litigaton", being a "Complaint for Declaratory Relief" filed on June 4, 1979 by William W. Martin as Plaintiff against Barbara Kelly, William E. Kane, K & K Properties, Inc. and Investors Replacement, Inc., Defendants. The Adversary "D" litigation has not been certified nor has plaintiff therein attempted to cause same to be certified as a class action under the Federal Rules of Civil Procedure or at all. Paragraph 13 of the complaint in the Adversary "D" litigation, however, recites

that plaintiff brings this action "in his own behalf and/or on behalf of all other creditors in this proceeding." Defendants in the Adversary "D" case have moved for its dismissal and plaintiff therein has moved to compel the Trustee to intervene in and prosecute said case. The Trustee has intervened therein as requested by plaintiff and acquiesced in defendants' motion to dismiss subject to approval of the settlement.

7. There is pending in the United States District Court, Central District of California, a case entitled *Robert E. Mosher, and William W. Martin, individually and on behalf of all other persons similarly situated, Plaintiffs, vs. William Everett Kane and Barbara Jean Kelly, Defendants,* Case No. 81-4458, entitled "First Amended Complaint for Damages Based on Violations of Proxy Regulations Under the Federal Securities Law—Class Action." This matter is hereinafter described as "the Mosher Action."

8. The proposed settlement requires dismissal of the Adversary "D" litigation. Said Settlement Agreement does not require dismissal of the Mosher Action or any other litigation not specifically described in the Settlement Agreement.

9. The Trustee has properly and reasonably determined and recommended that continued prosecution of the various claims

that plaintiff brings this action "in his own behalf and/or on behalf of all other creditors in this proceeding." Defendants in the Adversary "D" case have moved for its dismissal and plaintiff therein has moved to compel the Trustee to intervene in and prosecute said case. The Trustee has intervened therein as requested by plaintiff and acquiesced in defendants' motion to dismiss subject to approval of the settlement.

7. There is pending in the United States District Court, Central District of California, a case entitled *Robert E. Mosher, and William W. Martin, individually and on behalf of all other persons similarly situated, Plaintiffs, vs. William Everett Kane and Barbara Jean Kelly, Defendants,* Case No. 81-4458, entitled "First Amended Complaint for Damages Based on Violations of Proxy Regulations Under the Federal Securities Law—Class Action." This matter is hereinafter described as "the Mosher Action."

8. The proposed settlement requires dismissal of the Adversary "D" litigation. Said Settlement Agreement does not require dismissal of the Mosher Action or any other litigation not specifically described in the Settlement Agreement.

9. The Trustee has properly and reasonably determined and recommended that continued prosecution of the various claims

released pursuant to said Settlement Agreement are complex, uncertain of result and potentially expensive both in terms of attorneys' fees, court costs, and delay required, which delay could reasonably be expected to result in damage to the estate or detriment to creditors.

10. All of the parties appearing as well as the Trustee, but excepting Messrs. Martin and Mosher, believe that the factors described in Finding of Fact 9 hereof have been fully and reasonably explored and considered, and that the compromise is fair, reasonable and in the best interests of creditors.

11. There is, in fact, a series of disputes of the type which ought to be resolved by compromise, all as set forth in the Trustee's Application to Compromise Controversy and described in the Settlement Agreement which is an exhibit thereto.

12. On or about December 21, 1977, a settlement agreement was entered into by and between the A & C entities and K & K, Kane, Kelly and others (said settlement agreement is hereinafter referred to as the "1977 Compromise"). The 1977 Compromise was approved by the Court in the Chapter XI case after a hearing, on notice, with participation by various parties. The 1977 Compromise was, by its terms, and by the terms of the court order approving same, made binding upon any successor-in-interest of

released pursuant to said Settlement Agreement are complex, uncertain of result and potentially expensive both in terms of attorneys' fees, court costs, and delay required, which delay could reasonably be expected to result in damage to the estate or detriment to creditors.

10. The only parties who contended that the compromise is not fair, reasonable and in the best interests of creditors were Messrs. Martin and Mosher and the Legal Action Comittee For Marlin Investments.

10a. The factors described in Finding of Fact 9 hereof have been fully and reasonably explored and considered.

11. There is, in fact, a series of disputes of the type which ought to be resolved by compromise, all as set forth in the Trustee's Application to Compromise Controversy and described in the Settlement Agreement which is an exhibit thereto.

12. On or about December 21, 1977, a settlement agreement was entered into by and between the A & C entities and K & K, Kane, Kelly and others (said settlement agreement is hereinafter referred to as the "1977 Compromise"). The 1977 Compromise was approved by the Court in the Chapter XI case after a hearing, on notice, with participation by various parties. The 1977 Compromise was, by its terms, and by the terms of the court order approving same, made binding

the A & C entities, including any trustee in bankruptcy.

13. Under the terms of the present Settlement Agreement, the Trustee acknowledges the binding effect of the 1977 Compromise and waives any claims to the contrary.

14. It has been asserted by objectors that personal rights and claims of objectors and other members of the alleged class in the Mosher action whom they purport to represent (i.e., those rights or claims of objectors, or purported class members not deriving from or through the rights or powers of the Trustee in bankruptcy) might be adversely affected by dismissal of the Adversary "D" litigation. Such personal rights and claims ("objectors' personal rights and claims") to the extent they may exist, are not presently before this Court. Nor are the objectors, personally, parties to the Settlement Agreement or to the 1977 Compromise. Objectors' personal rights and claims are thus not affected by the Settlement Agreement.

15. The trustee is empowered to settle rights and claims of the Bankrupt against the parties to the Settlement Agreement, although such resolution may affect rights derivative from or through his rights and power.

16. The objectors have asserted that the provisions of the Settlement Agreement requiring termination of the K & K

upon any successor-in-interest of the A & C entities, including any trustee in bankruptcy.

13. Under the terms of the present Settlement Agreement, the Trustee acknowledges the binding effect of the 1977 Compromise and waives any claims to the contrary.

14. It has been asserted by objectors that personal rights and claims of objectors and other members of the alleged class in the Mosher action whom they purport to represent (i.e., those rights or claims of objectors, or purported class members not deriving from or through the rights or powers of the Trustee in bankruptcy) might be adversely affected by dismissal of the Adversary "D" litigation. Such personal rights and claims ("objectors' personal rights and claims") to the extent they may exist, are not presently before this Court. Nor are the objectors, personally, parties to the Settlement Agreement or to the 1977 Compromise. Objectors' personal rights and claims are thus not affected by the Settlement Agreement.

15. The trustee is empowered to settle rights and claims of the Bankrupt against the parties to the Settlement Agreement, although such resolution may affect rights derivative from or through his rights and power.

16. The objectors have asserted that the provisions of the Settlement Agreement requiring termination of the K & K

Employee Stock Ownership Plan (the "Plan" or "ESOP") and the vesting of shares owned by the Plan participants was not effected by the termination of the Plan by the K & K Board of Directors due to the failure of the Internal Revenue Service to issue a letter of determination with respect to the Plan. The only evidence adduced at trial indicated that (1) any changes required to secure the issuance of such letter of determination would be ministerial in nature and within the authority of K & K to accomplish; (2) even in the absence of such a letter of determination, K & K could waive such requirement; and (3) by termination of the Plan, the shares owed by the Plan would vest in the participants notwithstanding the nonissuance of the letter of determination. The Plan was terminated and the shares vested in the participants effective January 6, 1982.

17. The proposed compromise is the best reasonably obtainable under the circumstances and should be approved.

18. Any of the hereinafter designated Conclusions of Law which may also be or constitute Findings of Fact are, and each of them is incorporated herein by this reference.

CONCLUSIONS OF LAW

1. Any of the foregoing Findings of Fact which also constitute Conclusions of Law are and each is incorporated herein by this reference.

Employee Stock Ownership Plan (the "Plan" or "ESOP") and the vesting of shares owned by the Plan participants was not effected by the termination of the Plan by the K & K Board of Directors due to the failure of the Internal Revenue Service to issue a letter of determination with respect to the Plan. The only evidence adduced at trial indicated that (1) any changes required to secure the issuance of such letter of determination would be ministerial in nature and within the authority of K & K to accomplish; (2) even in the absence of such a letter of determination, K & K could waive such requirement; and (3) by termination of the Plan, the shares owed by the Plan would vest in the participants notwithstanding the nonissuance of the letter of determination. The Plan was terminated and the shares vested in the participants effective January 6, 1982.

17. The proposed compromise is the best reasonably obtainable under the circumstances and should be approved.

18. Any of the hereinafter designated Conclusions of Law which may also be or constitute Findings of Fact are, and each of them is incorporated herein by this reference.

CONCLUSIONS OF LAW

1. Any of the foregoing Findings of Fact which also constitute Conclusions of Law are and each is incorporated herein by this reference.

2. This case is governed by the Bankruptcy Act of 1898 ("Bankruptcy Act"), having been initiated prior to enactment of the Bankruptcy Reform Act of 1978. The proposed compromise was properly noticed to all parties entitled thereto under Bankruptcy Act Section 58a [11 U.S.C. § 94a] including but not limited to plaintiffs in the "Mosher Action" and those alleged class members purportedly represented by them. The notice which was approved by this Court was sufficient to place all interested parties on notice of the settlement and the terms thereof, including but not limited to the portions relating to dismissal of the Adversary "D" litigation as described in Finding of Fact 6.

3. The Trustee is vested with the rights and claims of the Bankrupt and has exclusive standing to pursue or to compromise such claims, subject to the approval of the Court.

4. The Bankruptcy Court has discretion to and should approve the compromise recommended by the Trustee in Bankruptcy after a hearing held upon appropriate notice, where it appears, as it does in this case, that expense, benefits, hazards and complexity of litigation, potential delay and waste of time, effort and expense might otherwise result.

5. Where, as in this case, a compromise has been negotiated in good faith by a Trustee, and is

2. This case is governed by the Bankruptcy Act of 1898 ("Bankruptcy Act"), having been initiated prior to enactment of the Bankruptcy Reform Act of 1978. The proposed compromise was properly noticed to all parties entitled thereto under Bankruptcy Act Section 58a [11 U.S.C. § 94a] including but not limited to plaintiffs in the "Mosher Action" and those alleged class members purportedly represented by them. The notice which was approved by this Court was sufficient to place all interested parties on notice of the settlement and the terms thereof, including but not limited to the portions relating to dismissal of the Adversary "D" litigation as described in Finding of Fact 6.

3. The Trustee is vested with the rights and claims of the Bankrupt and has exclusive standing to pursue or to compromise such claims, subject to the approval of the Court.

4. The Bankruptcy Court has discretion to and should approve the compromise recommended by the Trustee in Bankruptcy after a hearing held upon appropriate notice, where it appears, as it does in this case, that expense, benefits, hazards and complexity of litigation, potential delay and waste of time, effort and expense might otherwise result.

5. Where, as in this case, a compromise has been negotiated in good faith by a Trustee, and is

reasonably believed by him to be the best compromise negotiable under the facts of the given case, the court should approve the recommended settlement.

6. The termination of the K & K ESOP effected by the Board of Directors of K & K as of January 6, 1982, fully vested the stock held in the Plan by the individual participants of the Plan, as required by Section 1.3.3 of the Settlement Agreement.

7. The matter of dismissal of the Adversary "D" litigation is properly before the court by reason of motions to dismiss the same heretofore filed by the defendants therein.

8. Dismissal of the Adversary "D" litigation with prejudice is without prejudice to the objectors' personal rights and claims (as opposed to objectors' rights and claims which derive from or through the Trustee in Bankruptcy) to the extent, if any, that they are alleged in the Mosher Action; and, in particular, the dismissal of the Adversary "D" litigation will not constitute an adjudication of objectors' personal rights and claims, if any, in the Mosher Action.

UNITED STATES
BANKRUPTCY JUDGE

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7. The matter of dismissal of the Adversary "D" litigation is properly before the court by reason of motions to dismiss the same heretofore filed by the defendants therein.

8. Dismissal of the Adversary "D" litigation with prejudice is without prejudice to the objectors' personal rights and claims (as opposed to objectors' rights and claims which derive from or through the Trustee in Bankruptcy) to the extent, if any, that they are alleged in the Mosher Action; and, in particular, the dismissal of the Adversary "D" litigation will not constitute an adjudication of objectors' personal rights and claims, if any, in the Mosher Action.

JOHN E. BERGENER
UNITED STATES
BANKRUPTCY JUDGE

APPENDIX H

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: A & C PROPERTIES, a Joint Venture and the Consolidated Cases, *Bankrupts.*	BK. NO. 76-02940 RM

ORDER COMPROMISING CONTROVERSY

After notice duly given by the Court to creditors and others entitled thereto, there was heard before the undersigned United States Bankruptcy Judge on February 23, 1982 and certain dates thereafter the matter of the Trustee's Application to Compromise Controversy with K & K Properties, Inc., William Kane, Barbara Kelly, Kane and Kelly Associates, Inc., and others and the objections filed thereto by Robert E. Mosher and William W. Martin. Appearances were made by and on behalf of the following: the Trustee appeared through counsel Danning, Gill, Gould, Joseph & Diamond by David A. Gill. K & K Properties, Inc. appeared specially through James V. Looby of Hochman, Salkin & Deroy. Louis Meisinger of Hill Wynne Troop and Meisinger appeared specially on behalf of William Kane and Barabara Kelly. Linda Lasley of Buchalter, Nemer, Fields, Christie & Younger appeared on behalf of the Mid-Jersey Trucking Industry Local 701 Pension Fund. James Wawro appeared on behalf of Manufacturers Hanover Bank. Noble, Campbell & Uhler appeared on behalf of William W. Martin, Robert Mosher and "The Legal Action Committee" by Richard Noble and Stephen W. Holohan.

The Court, having made its findings of fact and conclusions of law, HEREBY ORDERS:

1. The Trustee's Application to Compromise Controversy is approved.

2. The Trustee is authorized to do all things necessary and appropriate to consummate said settlement.

3. That certain Conditional Intervention filed by the Trustee with regards to the Adversary "D" litigation is confirmed. Further, it is the determination of this Court that, having intervened, the Trustee enjoys the authority to dismiss said proceeding at his discretion. Trustee's Motion to Dismiss Complaint, filed with this Court on January 26, 1982 is therefore approved, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. Such dismissal may be, at the discretion and on request of the Trustee and subject to confirmation by this Court, without leave to plaintiffs of anyone else to file in this Court any new complaint based upon facts and allegations giving rise to the said Adversary "D" litigation.

4. Any such dismissal by the Trustee, however, of said Adversary "D" litigation shall be without prejudice to the rights and claims of the plaintiffs in that certain action now pending in the United States District Court, Central District of California No. 81-4454, entitled *Robert E. Mosher, etc., et al., Plaintiffs*, v. *William Everett Kane, etc., et al., Defendants* ("the Mosher Action"), except to the extent that such rights are derivative from the rights and powers of the Trustee in Bankruptcy.

DATED: April 14, 1983.

/S/ JOHN E. BERGENER

JOHN E. BERGENER
Bankruptcy Judge

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re A & C PROPERTIES, *Bankrupt.* WILLIAM W. MARTIN, et al., *Appellants,* vs. GILBERT ROBINSON, *Appellee.*	CV 83-2867-RMT No. CV 83-7012-RMT CV 83-8066-RMT Bkcy. No. 76-2940(JB) ORDER AFFIRMING BANKRUPTCY COURT ORDERS

This matter came before the court for hearing on May 14, 1984 on the appeal by William W. Martin, Robert E. Mosher and The Legal Action Committee for Marlin Investments from the following orders entered by the Bankruptcy Court:

(1) "Order Compromising Controversy" and "Findings of Fact and Conclusions of Law on Trustee's Application to Compromise Controversy," both entered on April 18, 1983;

(2) "Order re Motion for Stay of Enforcement of Order Entered April 18, 1983," entered on August 8, 1983;

(3) "Consent to and Request for Ex Parte Order Dismissing Complaint with Prejudice; Declaration of David A. Gill; and Order Thereon," entered on October 21, 1983; and

(4) "Order Denying Motion for an Order Correcting Clerical Error and Etc.," entered on October 21, 1983.

On December 9, 1983 appellants filed herein a motion to review and modify bankruptcy court order entered on November 15, 1983, the hearing on which was consolidated with the hearing on these appeals.

This court having duly considered the briefs filed herein, the argument of counsel and the record on appeal and having found that the Bankruptcy Court, in the orders on appeal herein, has not committed an error of law and has not abused its discretion,

IT IS ORDERED that the Bankruptcy Court orders on appeal herein are affirmed.

Based on the foregoing,

IT IS FURTHER ORDERED that the motion to review and modify bankruptcy court order entered on November 15, 1983 is denied.

DATED: June 20, 1984.

/s/ ROBERT M. TAKASUGI

ROBERT M. TAKASUGI
United States District Judge

APPENDIX J

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: A & C PROPERTIES, *Debtors.*	
WILLIAM W. MARTIN, et al., *Plaintiffs,* Superseded by: GILBERT ROBINSON, *Plaintiff in Intervention,* vs. WILLIAM E. KANE, BARBARA KELLY, K & K PROPERTIES, INC., and INVESTORS REPLACEMENT, INC., *Defendants.*	C.A. No. 84-6071 DC No. CV 83-2867-RMT Bkcy No. 76-2940-RM OPINION
WILLIAM W. MARTIN, et al., *Objectors-Plaintiffs-Appellants,* vs. GILBERT ROBINSON, Trustee in Bankruptcy, *Plaintiff in Intervention Appellee.*	

Appeal from the United States District Court
for the Central District of California
on Appeal from the United States Bankruptcy Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding
John E. Bergener, Bankruptcy Judge, Presiding

Argued and Submitted: December 4, 1985—Pasadena, California

Decided: [March 17, 1986]

Before: BARNES, GOODWIN and BOOCHEVER, Circuit Judges.

BARNES, Senior Circuit Judge:

William W. Martin ("Martin"), Robert E. Mosher ("Mosher"), and the Legal Action Committee for Marlin Investments ("LAC"), appeal from the district court affirmance of the bankruptcy court order compromising the bankruptcy controversy and approving a settlement agreement entered into between the bankruptcy trustee and the debtors. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I. FACTS

This appeal arises from a lengthy and complex proceeding before the bankruptcy court. For purposes of explanation, we must review the factual background leading to the filing of the petition for bankruptcy by the debtors in this action.

Between 1969 and 1975 Mosher and Martin invested in some or all of eighteen joint ventures (hereinafter "the A & C Entities" or "A & C"), each of which consisted of one or more limited partnerships, organized and sold by general partner, Barry Marlin ("Marlin"). The limited partnerships were usually offered as tax-sheltered investments. The A & C Entities owned various rental properties, leasehold interests and promissory notes receivable, some of which were subject to liabilities.

On January 1, 1976, K & K Properties, Inc. ("K & K"), a newly-formed Delaware corporation organized and controlled by William Kane ("Kane") and Barbara Kelly ("Kelly"), assumed the management of the A & C properties. The assets and liabilities of the A & C Entities were transferred to K & K in exchange for eighty percent of the K & K stock. Kane, Kelly and Marlin retained the remaining twenty percent. Marlin remained a general partner and manager of the A & C Entities.[1]

1. Marlin was later relieved of his duties as general partner and joint venture manager. Criminal proceedings were brought against him in several jurisdictions as a result of his participation in various allegedly fraudulent real estate and financial schemes. These proceedings have resulted in Marlin's conviction and sentence to ten years in prison. However, Marlin is not a party to these appeals. Although several California state court actions were commenced by him and against him, they are not the subject of review herein.

On August 19, 1976, the A & C Entities filed for protection under Chapter XI of the Bankruptcy Act. Numerous disputes arose between the appellants and other investor-creditors, the A & C Entities, K & K, and Kane and Kelly, involving the rights of the various parties in connection with the transaction in which K & K acquired the assets of the A & C Entities. The Legal Action Committee for Marlin Investments ("LAC") was formed by Mosher and Martin to represent the interests of some of the A & C Entities investor-creditors.

The bankruptcy court approved a compromise on December 21, 1977, ("1977 Compromise") which was negotiated by the parties to this appeal, and actively participated in by appellants. The 1977 Compromise provided for the resolution of disputes which arose from the 1976 agreement in which K & K acquired the assets of the A & C Entities in exchange for stock. Its terms provided (a) for the distribution of some of the K & K stock owned by Kane and Kelly to the A & C Entities, and (b) for the previously established Voting Trust[2] to exercise its previously established voting rights. In addition, A & C Entities released K & K and Kane and Kelly individually, for any claims or liabilities arising from any association between the parties. As a result of this compromise, some of the A & C Entities and certain investor-creditors, including the appellants, sued K & K for breach of contract and fraud.

In an effort to settle and satisfy the claims of the investor-creditors, several plans of arrangement were negotiated and filed with the bankruptcy court. Pursuant to the terms of the 1977 Compromise, to solicit votes of the K & K shares held by the A & C Entities, in order to approve a plan of arrangement for the settlement and satisfaction of the creditors' claims, a K & K Prospectus and proxy solicitation were prepared on August 29,

2. This voting trust, established in May, 1976, was entered into by A & C and K & K, and provided that the A & C Entities would transfer their collective shares in K & K (approximately eighty percent of the outstanding shares) to a voting trustee to be selected by the advisory committee of K & K. This committee consisted of the K & K Board of Directors and twenty-two delegates from the A & C Entities.

1978. This Prospectus and proxy solicitation, along with a registration statement, were filed with the SEC in 1980. The Prospectus was prepared by K & K, and included an explanation of the transactions which had occurred, the status of the bankruptcy proceedings, and a financial statement which purported to represent the fair value of K & K's assets.

During the pendency of the bankruptcy proceedings, in March of 1978, K & K authorized the establishment of an Employee Stock Ownership Trust ("ESOT"). Appellants allege that the provisions of this ESOT, coupled with the valuation of the K & K shares, were inequitable to the investor-creditors.

On February 20, 1979, Martin filed a complaint, designated "Adversary Proceeding B," for declaratory relief in the bankruptcy court, on behalf of himself and all other creditors, against K & K, Kane and Kelly. On June 4, 1979, Martin filed an amended complaint, designated as "Adversary Proceeding D," which requested relief, based upon allegations of fraud and violations of federal securities laws. The bankruptcy court eventually dismissed this action with prejudice.

After numerous attempts to implement and approve a plan of arrangement had failed, the bankruptcy judge filed an order on September 10, 1979, adjudicating the debtors (A & C Properties, et al.) bankrupt under Title VII of the Bankruptcy Act, and appointed Gilbert Robinson ("Robinson") as trustee to supervise the liquidation and distribution of the assets of K & K to its shareholders. Various plans of arrangement were filed in an effort to liquidate the assets of K & K and distribute the proceeds to the shareholders. Robinson, as trustee, managed the corporation, appointed directors and was responsible for carrying out the Voting Trust, and ensuring that the corporate assets were preserved for distribution to creditors.

The bankruptcy court, upon Robinson's unopposed motion, entered an order on July 8, 1981, authorizing him to vote the shares of the A & C Entities (which shares constituted a majority of the total outstanding shares in K & K), and to elect individuals

to the board of directors. These persons were "independent directors" proposed by Robinson.

On January 6, 1982, Robinson entered into a settlement agreement with K & K, Kane, Kelly, and Kane and Kelly Associates to provide for the distribution of the K & K assets to the shareholders. The trustee filed an application with the bankruptcy court to compromise the controversy, a notice of this application was signed by the bankruptcy court on January 26, 1982, and mailed to the creditors on February 4, 1982. On June 18, 1982, after numerous hearings on the matter, the bankruptcy court approved the trustee's application to compromise. The court on March 18, 1983, entered its order compromising the controversy, thereby adopting the terms of the settlement agreement, and it entered its findings of fact and conclusions of law to support its order. Appellants filed timely appeals to the district court from the findings and orders of the bankruptcy court. The district court entered its order on June 22, 1984, summarily affirming the bankruptcy court in all respects, finding that the bankruptcy court had committed no error of law and had not committed an abuse of discretion. The appellants filed a timely appeal to this court from the district court's affirmance of the bankruptcy court. Both the district court and this court have jurisdiction to review the decision of the bankruptcy court under 28 U.S.C. §§ 1293 and 1334[3]

II. DISCUSSION

The sole issue raised on appeal is whether the district court erred in affirming the bankruptcy court's approval and implementation of a 1982 settlement agreement between the bankruptcy trustee and the debtors where the agreement was objected to by certain creditors.

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3. The effective date of these Code sections was April 1, 1984. The appeals to the district court were filed prior to the effective date of these statutes, on April 28, 1983, August 23, 1983, October 27, 1983 and November 8, 1983. However, Congress provided that during the interim period prior to the effective date of 28 U.S.C. §§ 1293 and 1334, the appellate jurisdiction of the courts would be the same as that provided for in these statutes. Pub. L. 85-598, Title IV, § 405(c)(2), 92 Stat. 2685 (1978).

In an appeal from the district court's affirmance of a decision of the bankruptcy court, our role is essentially the same as that of the district court, and we are, in essence, reviewing the final order of the bankruptcy court. *In re Global Western Development Corp.*, 759 F.2d 724, 726 (9th Cir. 1985) (per curiam).

We review the bankruptcy court's findings of fact under the "clearly erroneous" standard and its conclusions of law *de novo*. *In re Global Western*, 759 F.2d at 726. However, the bankruptcy court's order approving the trustee's application to compromise the controversy is reviewed for an abuse of discretion. *In re Transcontinental Energy Corp.*, 764 F.2d 1296, 1298-99 (9th Cir. 1985); *Matter of Walsh Construction, Inc.*, 669 F.2d 1325, 1328 (9th Cir. 1982); *In re Blair*, 538 F.2d 849, 851 (9th Cir. 1976).

A. Validity of the Compromise

Under Section 27 of the Bankruptcy Act, 11 U.S.C. § 50 (1976) (repealed 1978),[4] a trustee " 'may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate.' " *In re Transcontinental*, 764 F.2d at 1298 (citation omitted), *Matter of Walsh*, 669 F.2d at 1328. The purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims. *Matter of Walsh*, 669 F.2d at 1328 (citing *In re California Associated Products Co.*, 183 F.2d 946, 949-50 (9th Cir. 1950)). The law favors compromise and not litigation for its own sake, *In re Blair*, 538 F.2d at 851, and as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision must be affirmed. *See Matter of*

4. Although the order approving the compromise was entered after the repeal of the authorizing statute, since the original bankruptcy petition was filed prior to its repeal, the Bankruptcy Act of 1898 governs. *See In re Transcontinental*, 764 F.2d at 1298 n.2. Even assuming that Section 27 does not apply to this order, 11 U.S.C. § 105(a) (1984) allows the court to issue any order, process or judgment necessary or appropriate to carry out the provisions of Title 11.

Walsh, 669 F.2d at 1329. Thus, on review, we must determine whether the settlement entered into by the trustee was reasonable, given the particular circumstances of the case. *In re Equity Funding Corporation of America*, 519 F.2d 1274, 1277 (9th Cir. 1975).

Appellants argue several grounds for reversing the bankruptcy court's approval of the compromise agreement. We address each separately, in turn.

1. *Burden of Proof and Burden of Persuasion Required to Support Approval of Compromise.*

Appellants first challenge the bankruptcy court's conclusion of law, affirmed by the district court,[5] which provided that where a compromise has been negotiated in good faith by a trustee, and is reasonably believed by him to be the best compromise negotiable under the facts of the given case, the court should approve the recommended settlement. Appellants allege that such a conclusion not only misstates the law, but that it places the burden on the objectors to prove that the settlement agreement is not fair, equitable and in the best interest of the creditors.

It is clear that there must be more than a mere good faith negotiation of a settlement by the trustee in order for the bankruptcy court to affirm a compromise agreement. The court must also find that the compromise is fair and equitable. *See, e.g., Citibank, N.A.* v. *Baer*, 651 F.2d 1341, 1345-46 (10th Cir. 1980).

In determining the fairness, reasonableness and adequacy of a proposed settlement agreement, the court must consider:

> (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily

5. Where the district court summarily affirms the bankruptcy court's orders without setting forth separate Finding of Fact and Conclusions of Law, the district court is deemed to have adopted those of the bankruptcy court. *Chase Capital Corp.* v. *Bumb*, 336 F.2d 1000,1001 (9th Cir. 1964), *cert. denied*, 380 U.S. 934 (1965).

attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

In re Flight Transportation Corporation Securities Litigation, 730 F.2d 1128, 1135 (8th Cir. 1984) (citations omitted), *cert. denied*, 105 S. Ct. 1169 (1985). *Accord, Matter of Jackson Brewing Co.*, 624 F.2d 605, 607 (5th Cir. 1980) (court must review the particular facts and circumstances with adequate detail and explanation to determine (1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and (3) all other factors bearing on the wisdom of the compromise). The record reflects the careful consideration given to the compromise by the bankruptcy court and the inordinate amount of expertise which went into the ultimate compromise approval. *See In re Blair*, 538 F.2d at 851 n.1.

The trustee, as the party proposing the compromise, has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved. *In re Hallet*, 33 B.R. 564, 565-66 (Bankr. D. Me. 1983). It is clear from the record that the trustee met this burden. The bankruptcy court held five days of hearings on the trustee's application for compromise. During the hearings, the bankruptcy court weighed the evidence presented, heard testimony on the fairness of the compromise, and considered the objections presented by the appellants.

Appellants argue that the bankruptcy court had ignored their objections to the compromise and had, in essence, shifted the burden of proof to them to show that the compromise was not negotiated in good faith. However, appellants' argument is not supported by the record. In addition, while creditors' objections to a compromise must be afforded due deference, such objections are not controlling, *In re Transcontinental*, 764 F.2d at 1299; *accord*, *In re Hallet*, 33 B.R. at 566; *In re The General Store of Beverly Hills*, 11 B.R. 539, 541 (Bankr. 9th Cir. 1981), and

while the court must preserve the rights of the creditors, it must also weigh certain factors to determine whether the compromise is in the best interest of the bankrupt estate. *Matter of W. T. Grant Co.*, 4 B.R. 53, 69 (Bankr. S.D.N.Y. 1980).

Any possible inference in the conclusion of law that all that is required for the bankruptcy court to affirm an agreement is the good faith negotiation of a settlement by the trustee is clarified by conclusion of law number 4 which states:

> The Bankruptcy Court has discretion to and should approve the compromise recommended by the Trustee in Bankruptcy after a hearing held upon appropriate notice, where it appears, as it does in this case, that expense, benefits, hazards and complexity of litigation, potential delay and waste of time, effort and expense might otherwise result.

The conclusion of law which appellants challenge did not shift the burden for production of proof regarding the fairness of the settlement agreement. Any error in the conclusion was not material when read in conjunction with the other findings and conclusions which the bankruptcy court made.

2. *Sufficiency of Findings of Fact.*

The second claim of error asserted by appellants is that the bankruptcy court failed to make findings of fact which (1) reflect a reasoned analysis of the settlement, and (2) permit an appellate court to make a proper review. However, the record, when reviewed as a whole, supports a determination otherwise.

Appellants argue that the holdings in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414 (1968) ("*TMT Trailer*"), and *Matter of Jackson Brewing Co., supra*, require the bankruptcy court to "analyze and describe the merits and essential elements of both: 1) the Agreement as a whole; and, 2) the various claims which it purported to resolve." Appellants allege that the findings of fact and conclusions of law are "boiler plate," and as such are defective since the bankruptcy court failed to include a cost-benefit analysis of the relative merits of pursuing or settling the various

claims which the trustee surrendered, or any evaluation of the consideration which he purportedly received. We disagree.

In *TMT Trailer*, the court determined that

> [t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

390 U.S. at 424-25. However, the Court gives us no specific direction on how much specificity or detail the bankruptcy court is required to put into its findings of fact or conclusions of law in order to comply with the Supreme Court's language.

In our case, the bankruptcy court's findings of fact and conclusions of law are rather general. However, the bankruptcy court attached to these findings and conclusions a copy of the settlement agreement upon which it relied, and which it approved. The settlement agreement, which is twenty-five pages in length, sets forth in detail the claims which it purports to settle, the parties involved, the valuation of the corporate assets, the identity of shareholders and the number of outstanding shares, the cost-benefit analysis of the relative merits of pursuing or settling the various claims, and the conditions which would enable the trustee to proceed with the liquidation. Appellate review is made more difficult by the lower court's failure to write an opinion explaining why it deemed the compromise to be fair, reasonable and adequate. *See In re Flight Transportation Corp.*, 720 F.2d at 1136. However, where the record supports approval of the compromise, the bankruptcy court should be affirmed. *See, e.g., Id.*

It is clear from the record before us, which is well over four thousand pages with reporter's transcripts amounting to nearly one thousand pages, that the bankruptcy judge was informed and had apprised himself of all facts necessary to make an intelligent and independent judgment that the compromise was fair and equitable. The litigation was filed in the bankruptcy court in 1976, and the judge who approved the compromise had handled the matter since 1980. Thus, in addition to the settlement agreement, the bankruptcy judge had heard testimony on the value of the corporation's assets, the terms of the ESOT (which appellants challenge), and was well aware of the claims being asserted by appellants in their Adversary Proceeding D, which was before the court. There is clear support in the record for our affirming the findings of fact with respect to the approval of the compromise.

3. *Fairness of the Settlement Agreement.*

Appellants claim that the bankruptcy court abused its discretion in approving the settlement agreement and compromise "in the absence of a record which provides an adequate analysis of its merits." A court may approve a compromise or settlement only when it is "fair and equitable." *Matter of Aweco, Inc.*, 725 F.2d 293, 298 (5th Cir.), *cert. denied* 105 S.Ct. 244 (1984). An approval of a compromise, absent a sufficient factual foundation which establishes that it is fair and equitable, inherently constitutes an abuse of discretion. *Id.* at 299. However, the record in the case before this court is replete with factors which support the bankruptcy court's approval of the compromise.

This is not the case where the bankruptcy judge reached for his stamp and marked "approved" without some party supplying concrete facts. *See Matter of Aweco*, 725 F.2d at 300. Appellants argue that neither the court nor the trustee was sufficiently familiar with the ESOT or the Adversary Proceeding D. However, considerable evidence was presented on the ESOT, including its terms and provisions and its valuation.

The application to compromise the controversy and the settlement agreement, along with the testimony of hearings on the

application, indicate that the court made a full and fair independent assessment of the wisdom of the compromise. *Cf. Matter of Boston & Providence Railroad Corp.* 673 F.2d 11, 12 (1st Cir 1982). The trustee's application and the settlement agreement set forth in detail the claims pending against the bankrupt estate, and an evaluation of those claims. Furthermore, the findings and order of the bankruptcy court indicate that it made an independent evaluation from the trustee's application and settlement agreement, and from the rest of the proceedings before it. *Cf. id.* at 12-13. The bankruptcy court did not abuse its discretion in approving the compromise.

4. *Consideration of Creditors' Objections.*

Appellants contend that the bankruptcy court's failure to respond to each objection which they raised in their "objection to application to compromise controversy," constituted an abuse of discretion. However, appellants cite no cases directly supporting this proposition.[6]

Creditors' objections to a compromise must be afforded deference. *In re Transcontinental,* 764 F.2d at 1299; *accord, In re Hallet,* 33 B.R. at 566; *In re The General Store of Beverly Hills,* 11 B.R. at 541. In addition, the bankruptcy court is obligated to preserve the rights of the creditors. *Matter of W. T. Grant Co.*, 4 B.R. at 69. However, where, as here, the evidence on the issue of the compromise was thorough and comprehensive, the court was familiar with the entire record and touched all material bases of the creditors' objections, and held directly, expressly or by necessary implication, on every substantial point of contention, the court's approval of the compromise does not constitute an abuse of discretion. *Matter of Jackson Brewing Co.*, 624 F.2d at 612.

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6. Appellants cite *Mandujano* v. *Basic Vegetable Products, Inc.*, 541 F.2d 832, 836 (9th Cir. 1976), to support their argument that the bankruptcy court abused its discretion in failing to respond to each of their objections. However, that case involved a settlement in a class action suit filed under Title VII of the Civil Rights Act of 1964. The language in *Mandujano* is apparently limited to Title VII actions.

5. *Exclusion of Evidence and Testimony.*

Lastly, appellants argue that the bankruptcy court improperly limited their inquiry and refused to hear testimony on matters which they claim were necessary to the court's arriving at a fair and equitable compromise. Appellants assert that (1) their inquiry regarding the negotiating process with respect to the settlement agreement was relevant to the court's determination of fairness and that the court improperly limited their inquiry, and (2) the bankruptcy court improperly refused to hear testimony on the ESOT, which was necessary to the settlement of claims. These arguments have, at best, little merit.

The bankruptcy judge may give weight to the opinions of the trustee, the parties, and their attorneys. *In re Blair*, 538 F.2d at 851. Furthermore, the court may exclude evidence which is relevant where such evidence creates undue delay, waste of time or needless presentation of cumulative evidence. Fed. R. Evid. 403. In this case, although the bankruptcy court may have limited appellants' questioning of witnesses with respect to the negotiating process involved in the settlement agreement, the court did not prohibit such questioning altogether. Furthermore, with respect to the ESOT, considerable evidence was presented and appears in the record. The court permitted testimony on the ESOT and its effect on the settlement agreement. The court did not abuse its discretion in limiting testimony on these matters.

III. CONCLUSION

Appellants have "failed to articulate a coherent explanation of the threat posed to [their] claim by the compromise." *In re Transcontinental Energy Corp.*, 764 F.2d at 1299. Furthermore, when we consider the lengthy delay occasioned by this appeal and the additional attorneys' fees and appellate costs, this appeal, as a whole, may be an example of asset wasting. *In re Blair*, 538 F.2d at 851.

A finding that the compromise is fair and equitable is supported by the record. "As long as the approved plan is fair and equitable, we cannot reject it in favor of a plan that is more equitable." *Citibank, N.A.* v. *Baer*, 651 F.2d at 1346.

The judgments below are severally AFFIRMED.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: A & C PROPERTIES, *Debtors.* WILLIAM W. MARTIN, et al., *Plaintiffs,* Superseded by: GILBERT ROBINSON, *Plaintiff in Intervention,* v. WILLIAM E. KANE, BARBARA KELLY, K & K PROPERTIES, INC., and INVESTORS REPLACEMENT, INC., *Defendants.* WILLIAM W. MARTIN, et al., *Objectors-Plaintiffs-Appellants,* v. GILBERT ROBINSON, Trustee in Bankruptcy, *Plaintiff in Intervention Appellee.*	C.A. No. 84-6071 DC No. CV 83-2867-RMT Bkcy No. 76-2940-RM ORDER DENYING REHEARING AND AMENDING OPINION

Appeal from the United States District Court
for the Central District of California
on Appeal from the United States Bankruptcy Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding
John E. Bergener, Bankruptcy Judge, Presiding

Argued and Submitted: December 4, 1985—Pasadena, California

Filed March 17, 1986

[Filed May 13, 1986]

Before: BARNES, GOODWIN and BOOCHEVER, Circuit Judges

The petition for rehearing of appellants William W. Martin, Robert E. Mosher and the Legal Action Committee for Marlin Investments, is denied.

The opinion is amended as follows:

Page 3, line 1: delete the comma after "Kane" and insert "and"

Page 3, line 1: delete "and Marlin" after "Kelly"

Page 3, line 20: delete "the A & C Entities" and substitute "K & K"

Page 4, line 5: delete "some of the A & C Entities"

Page 4, line 18: delete "fair"

Page 5, line 13: add after "prejudice" "on October 18, 1983. Appellants Martin, Mosher and the LAC had filed other similar litigation dealing with the same matters which were the subject of the Adversary Proceeding D."

Page 5, line 17: change "Title VII" to "Article X"

Page 5, line 22 through page 5, line 25: delete text beginning with "Robinson became engaged in litigation in both state and bankruptcy courts. He attacked the Voting Trust and sought to gain control of K & K Properties through voting the stock of K & K owned by the A & C Entities."

Page 6, line 5: insert after "persons" ", all of whom were approved by the Bankruptcy Court,"

Page 6, line 8: replace "Keilly" with "Kelly"

Page 6, line 15: replace "March" with "April".

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. MOSHER and WILLIAM W. MARTIN, individually and on behalf of all other persons similarly situated,
Plaintiffs-Appellants,
v.
WILLIAM EVERETT KANE and BARBARA JEAN KELLY,
Defendants-Appellees.

C.A. No. 84-6318
DC No. CV 81-4458-WMB

OPINION

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding

Argued and Submitted: December 4, 1985—Pasadena, California

Filed March 17, 1986

Before: BARNES, GOODWIN and BOOCHEVER, Circuit Judges.

BARNES, Senior Circuit judge:

Robert E. Mosher ("Mosher") and William W. Martin ("Martin") appeal from the district court's dismissal of their complaint for failure to state a claim upon which relief can be granted, under Fed. R. Civ. P. 12(b)(6). We have jurisdiction under 28 U.S.C. § 1291 and we reverse the dismissal of this action.

I. FACTS

The basic facts underlying the filing of this action have been set forth in the related appeal, No. 84-6071, *In re A & C Properties,* and need not be repeated herein. However, we review briefly the procedural factors which led to the dismissal of this action.

Martin and Mosher filed this action[1] in the United States District Court on August 28 1981. They alleged that K & K, William Everett Kane ("Kane") and Barbara Jean Kelly ("Kelly") violated various sections of the federal securities law when exchanging stock in K & K for the assets of A & C Properties and that material misrepresentations where made when K & K filed with the SEC, a registration statement, consisting of a prospectus and proxy solicitation. Appellants argue that these misrepresentations violated: (1) Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder; (2) Section 14(a) of the Securities and Exchange Act of 1934 and Rule 14a-9 promulgated thereunder; and (3) Section 17(a) of the Securities Act of 1933. The appellants filed an amended complaint on December 11, 1981.

Thereafter, motions to dismiss were filed by the defendants, and the district court determined on hearing the motions to dismiss, that appellants had not stated a claim upon which relief could be granted. The Court dismissed the first amended complaint, without leave to amend, pursuant to Fed. R. Civ. P. 12(b)(6), on August 16, 1984. Appellants timely appeal this dismissal.

II. DISCUSSION

Appellants raise several issues to be decided on review:

1. Whether the complaint alleges sufficient facts to state a claim for relief under Section 10(b) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78j(b)), and Rule 10b-5 promulgated thereunder;

2. Whether the complaint alleges sufficient facts to state a claim for relief under Section 14(a) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78n), and Rule 14a-9 promulgated thereunder;

3. Whether there exists an implied private right of action under Section 17(a) of the Securities Act of 1933 (15 U.S.C.

1. Appellants filed this action as a class action pursuant to Fed. R. Civ. P. 23(b). However, the district court never certified the class.

§ 77q(a)), and if so, whether the complaint alleges sufficient facts to state a claim for relief thereunder;

4. Whether a common law action for fraud on the court may be maintained where the only pleaded jurisdictional basis is one of federal question and violation of federal law;

5. Whether the district court abused its discretion in refusing to allow plaintiffs to file amended complaints and in dismissing the action.

A. Standard of Review

On a motion to dismiss for failure to state a claim, a complaint is liberally construed in the plaintiff's favor, generally taking as true all material facts alleged in the complaint. *Rosen* v. *Walters*, 719 F.2d 1422, 1424 (9th Cir. 1983). Further, a complaint should not be dismissed under this rule "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Ernest W. Hahn, Inc.* v. *Codding*, 615 F.2d 830, 834 (9th Cir. 1980) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)). The sufficiency of a complaint is a question of law which we review de novo. *United States* v. *McConney*, 728 F.2d 1195, 1201 (9th Cir.)(en banc), *cert. denied*, 105 S.Ct. 101 (1984).

B. Section 10(b) and Rule 10b-5 Claims.

When considering a Section 10(b)[2] and Rule 10b-5[3] claim for relief, the court should liberally construe that claim in order to effectuate the policies underlying the federal securities laws.

2. Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) states:

It shall be unlawful for any person, directly or indirectly by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

3. Rule 10b-5, 17 C.F.R. 240.10b-5 (1985), provides:

Securities Investor Protection Corp. v. *Vigman*, 764 F.2d 1309, 1313 (9th Cir. 1985). Appellants argue that their Section 10(b) and Rule 10b-5 claims arose (1) out of the 1977 compromise, (2) from the creation of the ESOT,[4] (3) out of K & K's false and misleading registration statement, and (4) as a result of the alleged "forced sale" which occurred when the rights to the shares of K & K stock which they beneficially owned were transferred to the trustee.

The district court dismissed appellants' complaint on the basis that they did not have standing to sue. In order for a private plaintiff to have standing to bring an action under Section 10(b) or Rule 10b-5, the plaintiff must have been a purchaser or seller of the securities. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 731 (1975); *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461, 463 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). However, a contract to purchase or sell securities satisfies this standing requirement. *Blue Chip Stamps*, 421 U.S. at 750-51. Appellants present three arguments in support of a finding that a contract for a purchase and sale existed.

1977 Compromise.

Appellants first argue that the 1977 Compromise constituted a contract for purchase and sale of securities because it provided for

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It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

4. The ESOT is the Employee Stock Option Trust, implemented by K & K in March 1978, to be qualified as a stock bonus plan with the Internal Revenue Service, pursuant to Section 401 of the Internal Revenue Code, as amended. The trust was to be administered by an independent trustee, and provided for full time K & K employees to obtain a ten percent per year portion of the trust assets based upon employee compensation.

the issuance of K & K stock to appellants in exchange for the surrender of certain rights by appellants. The district court rejected this argument, finding that although appellants had entered into a final unconditional contract, they were neither purchasers or sellers, but allegedly beneficial owners.

The 1977 Compromise provided for appellees to cede stock to K & K, in exchange for the release by appellants of legal actions they might have against the appellees. Since a purchase or sale of stock by a corporation is not deemed to be a purchase or sale by the corporation's shareholders, *see, e.g., Rathborne* v. *Rathborne*, 683 F.2d 914, 919 (5th Cir. 1982), appellants do not have standing to allege a violation under the 1977 Compromise.

Plan of Arrangement.

Although no actual purchase or sale was ever consummated, the plan of arrangement which was prepared and approved by the shareholders in accordance with the 1977 Compromise provided for distribution of stock to appellants. Thus, under the "aborted purchaser-selier doctrine,"[5] appellants have standing under the Plan to allege violations of Section 10(b) and Rule 10b-5. *See Mount Clemens Industries, Inc.* v. *Bell*, 464 F.2d 339, 345 (9th Cir. 1972).

The district court found that the Plan did not become final, since it required the approval of the bankruptcy court. The court found, therefore, that no executory contract existed and appellants failed to meet the purchase or sale requirement required by the Securities and Exchange Act. *See Northland Capital Corp.* v. *Silver*, 735 F.2d 1421, 1427-30 (D.C. Cir. 1984) (no binding agreement and therefore no sale exists where disputes remain

5. The "aborted purchaser-seller doctrine" was first recognized by this circuit in *Clemens Industries Inc.* v. *Bell*, 464 F.2d 339 (9th Cir. 1972), and has been subsequently followed. *See Lewelling* v. *First California Co.*, 564 F.2d 1277 (9th Cir. 1977); *Walling* v. *Beverly Enterprises*, 476 F.2d 393 (9th Cir. 1973). The doctrine provides that a plaintiff has standing to bring and pursue an action under Section 10(b) as long as he or she had a contract to complete a securities transaction, even though the transaction was never consummated. *See* 30 Fed. Proc., L. Ed. § 70:323 (1985).

concerning actual required final documentation with respect to a contract which has been approved by both sides).

Nonetheless, although the Plan was never approved by the bankruptcy court, it was in fact one of the conditions of the 1977 Compromise, which the district court found to be an executed contract. Furthermore, the registration statement, including the prospectus and proxy solicitation, which was filed with the SEC was also a condition of the 1977 Compromise. Appellants alleged in their complaint that the fraud perpetrated by appellees was due to the statements and misrepresentations which appeared in the registration statement, and that appellees' fraud induced appellants to vote to approve the Plan. They further argue that it was this fraud which prevented the bankruptcy court from approving the Plan. Thus, the Plan was an executed contract whereby performance was allegedly frustrated by the appellees' fraud. There was a contractual relationship between the parties, and the transaction was allegedly aborted as a result of the fraud of the defendants. *Mount Clemens Industries, Inc.* v. *Bell,* 464 F.2d 339, 345 (9th Cir. 1972). This contractual relationship elevated appellants to the status of statutory purchasers, *see Mount Clemens, 464* F.2d at 345, thereby satisfying the purchaser requirement under the securities act. *See, e.g., Davis* v. *Davis,* 526 F.2d 1286, 1289 (5th Cir. 1976).

Forced Sale Doctrine.

Appellants also argue that the transfer to the trustee of the shares in K & K which they owned beneficially constituted a "forced sale," thereby qualifying them as sellers under the 1934 Securities and Exchange Act. We reject this argument.

The forced sale doctrine was first recognized in *Vine* v. *Beneficial Finance Co.,* 374 F.2d 627 (2d Cir. 1967), *cert. denied,* 389 U.S. 970 (1968), and has been adopted by the Ninth Circuit. *See Shivers* v. *Amerco,* 670 F.2d 826, 830 (9th Cir. 1982).

In essence, the doctrine provides that where a defendant is engaged in a scheme for the purpose of forcing the plaintiffs to convert their shares for money or other consideration, such acts

by the defendant allow a plaintiff standing to sue under the securities act. *See Landy* v. *Federal Deposit Insurance Corp.*, 486 F.2d 139, 158-59 (3rd Cir. 1973), *cert. denied*, 416 U.S. 960 (1974). Thus, where there has been a fundamental change in the nature of the plaintiff's investments, a forced sale will be deemed to have occurred. *Rathborne* v. *Rathborne*, 683 F.2d at 920.

Appellants Mosher and Martin have failed to allege that an actual liquidation of K & K has occurred or that there has in fact been a fundamental change in the nature of their investments. Thus, the forced sale doctrine does not apply.

C. Section 14(a) and Rule 14a-9 Claims.

Appellants argue that K & K, Kane and Kelly violated Section 14(a)[6] and Rule 14a-9[7] when they filed the registration statement and the prospectus and proxy solicitation with the SEC. The district court dismissed these claims on the ground that appellants had failed to allege a sufficient causal nexus between their injury

6. 15 U.S.C. § 78n(a) states:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered pursuant to [this title].

7. 17 C.F.R. § 240.14a-9 False or misleading statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

and the alleged wrongful acts, and that any injury was too attenuated to support their claim.

An essential element of Section 14(a) is the existence of a causal nexus between the alleged violation and the plaintiff's injury. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 384 (1970). The plaintiffs must show that their harm "resulted from the corporate transactions which were authorized as a result of the false or misleading proxy solicitations." *Abbey* v. *Control Data Corp.*, 603 F.2d 724, 732 (8th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980), *cited with approval* in *Gaines* v. *Haughton*, 645 F.2d 761, 775 n.23 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982).

In this case, the harm suffered by the plaintiffs resulted not from the corporate transactions authorized as a result of the allegedly false or misleading proxy solicitations, but rather the failure to approve the Plan, which failure prevented corporate transactions from occurring. This failure resulted from the false or misleading proxy solicitation. However, because the appellees' acts caused the failure of the corporate transactions to occur, we hold this to be sufficient to establish a claim under Section 14(a) and Rule 14a-9.

D. Section 17(a) Claim.

Under Section 17(a)[8] of the Securities Act of 1933, it is a violation to engage in any scheme to defraud in connection with

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8. Section 17(a), 15 U.S.C. § 77q(a) provides:

It shall be unlawful for any person *in the offer or sale* of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly-

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. [Emphasis added.]

the sale of a security.[9] In order to bring a claim under section 17(a), the plaintiff must be a purchaser or seller. *See, e.g., In re: Equity Funding Corp.*, 416 F. Supp. 161 (C.D. Cal. 1976).

Appellees argue that section 17(a) is narrower in scope than section 10(b) and that appellants have not sufficiently alleged the fraud in the offer or sale of securities. Several courts which have interpreted the language of the two statutes have held that the word *in* under section 17(a), is narrower than the phrase *in connection with*, under section 10(b). *See Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 545 F. Supp. 1314, 1355 (S.D.N.Y. 1982); *Maryville Academy* v. *Loeb Rhoades, & Co.*, 530 F. Supp. 1061, 1065-66 (N.D. Ill. 1981). However, even if we assume that section 17(a) is more narrow in scope than section 10(b), we are satisfied that appellants have, at least facially, pleaded a complaint sufficient to state a claim for relief.

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9. Appellees argue that we should go en banc and overrule prior Ninth Circuit precedent and find that no implied private right of action exists under section 17(a).

We recognize that the Supreme Court has three times specifically reserved this question and declined to decide it. *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 378 n.2 (1983); *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 557 n.9 (1979); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 n.6 (1975). We are further cognizant of the fact that there is a split in the circuits as to whether an implied private right of action should be recognized under section 17(a). *Compare Feldman* v. *Simkins Industries*, 679 F.2d 1299 (9th Cir. 1982) (holding that § 17(a) implies a private right of action); *accord Stephenson* v. *Calpine Conifers II, Ltd.*, 652 F.2d 808 (9th Cir. 1981); *and Kirshner* v. *United States*, 603 F.2d 234 (2d Cir. 1978) (same), *cert. denied*, 442 U.S. 909 (1979); *and Newman* v. *Prior*, 518 F.2d 97 (4th Cir. 1975) (same); *and Daniel* v. *International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America*, 561 F.2d 1223 (7th Cir. 1977) (same); *accord Surowitz* v. *Hilton Hotels Corp.*, 342 F.2d 596 (7th Cir. 1965), *rev'd on other grounds*, 383 U.S. 807 (1966) *with Keys* v. *Wolfe*, 709 F.2d 413 (5th Cir. 1983) (holding that an implied private right of action is not supported under § 17(a); *accord Landry* v. *All American Assurance Co.*, 688 F.2d 381 (5th Cir. 1982); *and Shull* v. *Dain, Kalman and Quail, Inc.*, 561 F.2d 152 (8th Cir. 1977) (same); *accord Greater Iowa Corp.* v. *McLendon*, 378 F.2d 783 (8th Cir. 1967).

As one panel of the court we have no authority to overrule *Feldman* and *Stephenson*, and in any event we believe that the better view is to recognize an implied private right of action.

E. Common Law Fraud.

Appellants argue, for the first time on appeal, that they should be able to maintain an action for common law fraud under a theory of pendant jurisdiction, even though they only pleaded violations of federal law in their complaint filed in the district court. An issue not raised before the trial court cannot be raised for the first time on appeal. *Trans Container Services* v. *Security Forwarders, Inc.*, 752 F.2d 483, 487 (9th Cir. 1985). Therefore, we leave to the district court on remand the determination of whether the common law fraud action is properly before it.

F. Filing of an Amended Complaint.

The Federal Rules of Civil Procedure provide that leave to amend a complaint should be freely given when justice so requires. Fed. R. Civ. P. 15(a). Where, as here, the parties have not engaged in intensive discovery, and allowing appellants to file an amended complaint would not unduly burden or prejudice the appellee, we are mindful of the liberal pleading provisions of the Federal Rules, and remand the matter to allow the appellants to file an amended complaint, if they so desire. *See e.g., Securities Investor Protection Corp.* v. *Vigman*, 764 F.2d at 1318.

III. CONCLUSION

Although the district court presented a careful and well reasoned analysis in its order to dismiss, we feel the better policy is to reverse the judgment of the district court, and remand this action to allow appellants to amend their complaint and proceed with their action. We do so noting that a ruling on the sufficiency of the complaint is not a forecast of what will be the outcome of the case. "'Once the matter gets beyond what the lawyers in legalese say the facts are and the Court sees what the real facts are, it may well wash out on summary judgement, . . . or if not then later on motion for directed verdict after the plaintiff's or all of the evidence is in.'" *Davis* v. *Davis*, 526 F.2d at 1290, (*quoting Tyler* v. *Peel Corp.*, 371 F.2d 788, 792 (5th Cir. 1967)).

REVERSED and REMANDED.

APPENDIX M

BANKRUPTCY ACT PROVISION INVOLVED

Sec. 27. (11 U.S.C. § 50.) Compromises.

The receiver or trustee may, with the approval of the court, compromise any controversy arising in the the administration of the estate upon such terms as he may deem for the best interest of the estate.

86-206

Supreme Court, U.S.
FILED
SEP 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1986

WILLIAM W. MARTIN, ROBERT E. MOSHER, AND THE LEGAL ACTION COMMITTEE FOR MARLIN INVESTMENTS,
Petitioners,

VS.

GILBERT ROBINSON, Trustee in Bankruptcy,
Respondent.

OPPOSITION OF RESPONDENT GILBERT ROBINSON TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals, in affirming the District Court's affirmance of Bankruptcy Court orders approving and implementing the so-called 1982 Settlement Agreement, has decided a special and important question of federal law in a way which is clearly in conflict with an applicable decision of this Court in an identical matter?

2. Whether the Court of Appeals, in affirming the District Court's affirmance of Bankruptcy Court orders approving and implementing the so-called 1982 Settlement Agreement, has acted in a manner which is in substantial conflict with a decision of another court of appeals in an identical matter?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were:

Gilbert Robinson, Trustee in Bankruptcy, Appellee
William Everett Kane, Interested Party
Barbara Kelly, Interested Party
K&K Properties, Inc., Interested Party
William W. Martin, Objector, Plaintiff, Appellant
Robert E. Mosher, Objector, Appellant

Additionally, the Petition contains a list of numerous individuals who are described as constituting the members of the so-called "Legal Action Committee" for Marlin Investments (sometimes herein called "LAC"). Petitioners allege that it is on behalf of the LAC in addition to certain of those parties set forth above, that the proceeding in the Court of Appeals was pursued. Respondent believes that the LAC has no standing. It was one of at least two such groups allegedly organized prior to conversion of a Chapter XI case to one in liquidating bankruptcy. Such Committee was not confirmed by the Court in the liquidating bankruptcy proceedings. However, there is no question that Messrs. Martin and Mosher, in their individual capacity, have standing herein.

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No. 86-

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1986

WILLIAM W. MARTIN, ROBERT E. MOSHER, AND THE LEGAL ACTION COMMITTEE FOR MARLIN INVESTMENTS,
Petitioners,

VS.

GILBERT ROBINSON, Trustee in Bankruptcy,
Respondent.

OPPOSITION OF RESPONDENT GILBERT ROBINSON TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Gilbert Robinson, Trustee in Bankruptcy, respectfully opposes the Petition filed by William W. Martin, Robert E. Mosher, and the so-called "Legal Action Committee for Marlin Investments" for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

I

STATEMENT OF THE CASE

A. Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit, as amended on denial of rehearing, is reported at 784 F.2d 1377 (9th Cir. 1986). A copy of said opinion appears at Appendix "A" to this Opposition.

B. Jurisdiction

Respondent concurs with the position taken by Petitioners at page 1 of their Petition relative to the basis for jurisdiction of this Court, at least as to Petitioners Martin and Mosher. See comments concerning Legal Action Committee at p. ii, *supra*.

C. Statute Involved

Respondent concurs with the position taken by Petitioners at page 2 of their Petition relative to the statute which this case involves.

II

STATEMENT OF FACTS

A. Introduction

The Petition herein contains certain factual allegations not supported by the record on appeal, misstatements of alleged facts, recitations of stale facts irrelevant to this appeal and discussion of numerous matters not supported by the evidence. Respondent will refrain from commenting at this time on those materials since they do not appear to be relevant to the immediate issues before this Court. However, lest silence in the face of such actions invite the inference that said allegations are admitted,

Respondent represents that it is not his intention to admit the truth or admissability of any of such facts.

B. Narrative

A & C Properties, Inc. ("A & C"), a consolidation of eighteen (18) separate entities, having been unsuccessful in promulgating and confirming a plan of arrangement in Chapter XI Bankruptcy Act proceedings which had been pending since August, 1976, was adjudicated by the Bankruptcy Court as a bankrupt on September 10, 1979. Gilbert Robinson was thereafter appointed as Trustee in Bankruptcy ("Trustee").

Among the principal assets of the estate of A & C was the ownership of a substantial number of common shares of K & K Properties, Inc. ("K & K"), a Delaware corporation. K & K had received substantial property from A & C prior to the institution of A & C's Chapter XI case, with certain shares in K & K being delivered to the transferor entities in consideration for the transfer. Approximately 20% of the stock was retained by the owners of K & K, William E. Kane, III ("Kane"), Barbara Kelly ("Kelly") and related entities. The Trustee succeeded to A & C's majority stock ownership of K & K. When he was appointed as Trustee, his rights to those shares of stock were subject to an alleged voting trust, which, it was alleged, was controlled by Kane and Kelly and related entities.

The Trustee became involved in litigation relative to attempts to terminate that voting trust, and ultimately resolved it successfully. When the Trustee acquired the right to vote said shares, he caused a new independent slate of additions to the board of directors to be elected to assume control of K & K. Thereafter, following analysis by the Trustee of complaints made by various creditors, and a detailed investigation conducted by the Trustee in

addition to that separately conducted by the independent non-interested-party K & K directors, it was determined that a portfolio of disputes existed between the Trustee and Kane, Kelly, K & K and other persons and entities.

By way of general description, these disputes included the following. Creditors had asserted that a court-approved settlement entered into in 1977 (the "1977 Compromise") between A & C, as a Chapter XI debtor, K & K, Kane, Kelly, and others, should be set aside for various reasons, generally going to the merits of the underlying acquisition by K & K of property of A & C, and questions as to the propriety of the Bankruptcy Court's order entered in 1977 approving a settlement thereof. Disputes existed concerning the promulgation and extension of the voting trust relative to A & C's stock ownership in K & K, which the Trustee averred created affirmative rights of action in his behalf against Kane, Kelly and others. The Trustee asserted claims arising out of the creation by K & K, under the stewardship of Kane and Kelly, of a certain Employee Stock Ownership Plan ("ESOP") and Employee Stock Ownership Trust ("ESOT"), particularly the propriety and validity of certain purchases by the ESOT of shares of stock in K & K at what was asserted to be an unfairly low price. The Trustee further complained of the creation by K & K, prior to the Trustee's acquisition of voting rights, of certain indemnification and other management agreements and extensions, allegedly favoring Kane, Kelly, and other insiders.

Additionally, litigation was pending when the Trustee was appointed, having been instituted by some of the parties who are the Petitioners herein against Kane, Kelly, K & K and others. The litigation which affected the bankruptcy estate included a bankruptcy adversary proceeding, generally described as "Adversary D," filed by

one or more of the persons who are Petitioners herein, and a virtually identical Cross-Complaint filed by them in an action in the Superior Court of the State of California for the County of Los Angeles. The gravamen of those two suits appeared to be claims arising out of the alleged procurement of the 1977 Compromise through alleged fraud on the Bankruptcy Court, and related charges and claims arising out of alleged actions of Kane, Kelly, K & K and related entities during the Chapter XI case.

Upon concluding their respective investigations regarding the foregoing disputes, the Trustee and the non-interested-party K & K directors negotiated with Kane and Kelly, and other interested parties, and, after lengthy and protracted negotiations, ultimately arrived at an arm's-length settlement (the "Settlement Agreement", "Settlement" or "Compromise") which the Trustee felt he could recommend to the creditors of A&C, and which the independent and other members of K & K's board of directors unanimously endorsed as being in the best interests of K & K. This tortuously negotiated Settlement resolved all of the foregoing disputes. A copy of the Settlement Agreement, which, among other things, recites in great detail the specifics of numerous disputes to be compromised and the reasons for said Settlement, is appended to the Petition for Writ of Certiorari as Appendix "B" thereto.

Pursuant to the terms of the Settlement, the bankruptcy estate was to receive, *inter alia*, property of substantial consideration from Kane, Kelly and related entities as follows: transfer to the Trustee of 90,000 shares of K & K stock, valued by the Trustee at approximately $1,000,000, resignation by Kane and Kelly as officers of K & K, return to K & K of approximately $160,000 in indemnity funds held by their counsel or

counsel for entities controlled by them, and release by Kane, Kelly and others of all known claims against K & K and its officers, directors, *et al.*

For their part, Kane, Kelly and certain others were to receive from the estate a special release of particular claims as described in Article II.5.1.2 of the Settlement Agreement, confirmation of certain limited indemnification rights and the agreement of the Trustee to dismiss or to cooperate in the dismissal of certain litigation including the so-called Adversary "D" litigation.

The Trustee's Application to Compromise, which was filed on January 26, 1982, incorporated a copy of the proposed Settlement Agreement. The Bankruptcy Court ordered that notice be given to all creditors and parties-in-interest, which was accomplished. The application was opposed only by Petitioners Martin, Robert E. Mosher ("Mosher") and the so-called "Legal Action Committee for Marlin Investments" ("LAC"). These parties did not oppose the concept of a settlement. Rather, they argued that the Settlement Agreement which had been negotiated by the Trustee was too generous to the other parties.

Hearings on the Trustee's Application consumed five days of trial over a period of several months. Extensive oral and documentary evidence was presented, comprising a record which is well over 4,000 pages in length, with reporter's transcripts amounting to nearly 1,000 pages.

The Trustee testified that the Settlement Agreement appeared to him, after considerable investigation and negotiation, to be the best obtainable under the circumstances and to be clearly in the best interests of the estate. The Trustee's point of view as to settlement of the existing disputes was shared by K & K as to its interests, as evidenced by the testimony of its new president, one of the new, independent directors. He testified that, in his

opinion, the Compromise was the best possible under the circumstances from K & K's standpoint. In addition, tax counsel for K & K testified that, in his opinion, for numerous reasons, including various tax implications, the Compromise was in the best interest of all parties.

Except as to Petitioners, the Trustee's conclusion and recommendation was not opposed by any of the numerous creditors of the estate including those represented at the hearing on the Compromise. In fact, at the conclusion of the hearings on the Compromise, the single largest unsecured creditor of the bankruptcy estate represented that it believed the Settlement Agreement to be in the best interests of the estate and to be the best resolution available under the circumstances.

On June 18, 1982, the Bankruptcy Court issued its written Memorandum Decision approving the Settlement Agreement. Following numerous objections to form, and further hearings, the Bankruptcy Court ultimately entered its Order Compromising Controversy and its Findings of Fact and Conclusions of Law on Trustee's Application to Compromise Controversy on April 18, 1983. The Findings of Fact and Conclusions of Law had been disputed and argued over for nearly a full year after entry of the Bankruptcy Court's Memorandum Decision before they were entered.

Petitioners subsequently perfected an appeal to the District Court from the Order Compromising Controversy and other Orders entered by the Bankruptcy Court and engaged in a lengthy series of repeated motions directed at blocking consummation of the Settlement Agreement, all of which were denied. On appeal, the District Court considered the record before it and, on June 22, 1984, entered an Order affirming the Bankruptcy Court's Order which approved the 1982 Settlement Agreement and various implementing orders.

Petitioners thereafter perfected an Appeal to the United States Court of Appeals for the Ninth Circuit. Pursuant to an Order entered on March 17, 1986, (as amended pursuant to its Order Denying Rehearing and Amending Opinion which was entered on May 13, 1986), the Court of Appeals affirmed the District Court's Order and upheld approval of the Compromise. Petitioners then timely filed a Petition for Writ of Certiorari.

III

THE REQUESTED WRIT SHOULD NOT ISSUE BECAUSE NONE OF THE SPECIAL AND IMPORTANT GROUNDS FOR GRANTING A WRIT OF CERTIORARI EXIST IN THIS CASE

A. A Writ of Certiorari Will Only Be Granted When There Exist Very Special and Important Reasons Therefor

Rule 17 of the Rules of the United States Supreme Court provides that review on a writ of certioriari is a matter of judicial discretion and will be granted only when there exist special and important reasons therefor. As demonstrated below, no such special and important reasons exist in this case.

In addition, for certiorari to be granted in this case, Petitioner must establish either that the Court of Appeals has decided an important issue of federal law in a manner which is clearly in conflict with applicable decisions of this Court or that the Court of Appeals has rendered a decision which is clearly in conflict with the decision of another federal court of appeals on exactly the same matter.

The decision rendered by the Court of Appeals is not in conflict with an applicable decision of this Court or another federal court of appeals in a bankruptcy liquida-

tion case involving approval of a compromise recommended by a Trustee. Even if a conflict might otherwise be found to exist, it would certainly not be sufficiently special, important or material to justify the granting of the writ sought by Petitioners. Thus, the writ of certiorari sought by Petitioners should be denied.

B. The Court of Appeals Applied the Correct Standard for This Bankruptcy Liquidation Case

Petitioners contend that the Court of Appeals in this case, by affirming the Settlement Agreement, (1) countermanded the standards established by this Court for the evaluation and approval of such agreements; (2) applied a standard for the evaluation and approval of such agreements which is in conflict with the standard recognized by certain other federal courts of appeals; and (3) applied a standard which cannot be logically and consistently applied. Petitioners have failed to establish the validity of any of these allegations.

Approximately ten years ago, in its decision in the case of *In re Blair*, 538 F.2d 849, 851 (9th Cir. 1976), the Ninth Circuit articulated the factors to be considered in deciding whether to approve a compromise in a liquidation bankruptcy case as follows:

> "[T]he trustee and bankruptcy judge should weigh the probable costs and benefits. They should consider factors such as complexity and hazards of litigation, the expense (attorneys' fees and the costs of court and discovery), the time required, and whether disapproval of the compromise would likely result in the wasting of assets."

Id., at 851. *Cf.* Conclusion of Law No. 4.

In that case, the Ninth Circuit further stated that when considering approval of a compromise recommended by a trustee in a liquidation bankruptcy proceeding, the bank-

ruptcy judge and the district court may consider the following:

> "[T]he principals' belief that the factors outlined above (and others) have been explored and considered and that the compromise is fair, reasonable, and the wisest course. Consideration should also be given to the principle that the law favors compromise and not litigation for its own sake."

Id. Cf. Conclusion of Law No. 5.

These factors have continued to be considered in liquidation bankruptcy cases decided since that date under the former Bankruptcy Act and under the Bankruptcy Code. *See, e.g., In re General Store of Beverly Hills*, 11 Bankr. 539, 541 (Bankr. 9th Cir. 1981). In addition, as evidenced herein, this standard has been logically and consistently applied. The Court of Appeals in this case gave consideration to the factors articulated in the case of *In re Blair, supra. See In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986).

Petitioners aver that the applicable standard is not that set forth in *Blair, supra,* but that articulated by this Court in the case of *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson* ("*TMT Trailer*"), 390 U.S. 414, 424-25, 88 S.Ct. 1157 (1968), which involved a Chapter X Bankruptcy Act reorganization case. The Court of Appeals described the rule of that case as follows:

> "In *TMT Trailer*, this Court determined that:
>
> '[t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the

> judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.' "

Petitioners allege that the Court of Appeals, by failing to require a "mini-trial" on the merits and an exhaustive inquiry into all matters related to the reasonableness of the Settlement, has rejected standards adopted by this Court in *TMT Trailer, supra,* and logical extensions thereof. *See, e.g.*, Petition at p.24. Petitioners have asserted that extremely stringent standards of the type heretofore only required in certain Chapter X reorganizations under the Bankruptcy Act, and certain non-bankruptcy matters, must be imposed in the approval and review of bankruptcy settlements in liquidating bankruptcy cases, including an elaborate hearing on the approval of the Settlement Agreement, constituting a mini-trial, thereby enabling Petitioners to inquire into various matters which the Bankruptcy Court found to be inappropriate for the hearing which was held in this case. Such was never the absolute rule in Chapter X, much less in liquidating bankruptcy cases.

To the contrary, the Ninth Circuit has clearly and consistently indicated in numerous decisions that the Bankruptcy Court is not required to conduct such an exhaustive investigation into the validity of an asserted claim in connection with its hearing on a proposed compromise in a *liquidation bankruptcy case. See In re California Associated Products Co.*, 183 F.2d 946, 949-950 (9th Cir. 1950); *Matter of Walsh Construction, Inc.*, 669 F.2d

1325, 1328 (9th Cir. 1982); *In re Blair, supra,* at 851-52; *In re Equity Funding Corp. of America,* 519 F.2d 1274, 1277 (9th Cir. 1975).

In the case of *In re Blair, supra,* the Ninth Circuit expressly considered the question of whether all of the dictates of this Court in the *TMT Trailer* Chapter X reorganization proceeding applied to a compromise pursuant to Section 27 of the Bankruptcy Act (11 U.S.C. Section 50). In considering that question, the Court stated as follows:

> "Appellant asserts that even in a liquidation bankruptcy compromise proceeding, there must be a mini-trial on the merits of claims sought to be compromised. We reject the notion. The *decision as to whether there should be a mini-trial in a liquidation bankruptcy as to the merits of the compromised claims and defenses is best left to the sound discretion of the bankruptcy judge* upon an application and showing of necessity by the interested parties or by creditors of the bankrupt.
>
> "*This is not the same as a Chapter X proceeding and there are sound reasons for drawing the distinction.* A corporate reorganization is a continuing business affair requiring close supervision and affecting many interested parties. The success or failure of a reorganization may hinge upon the very compromise at issue. A liquidation bankruptcy is a terminal affair. The bankrupt's financial affairs are beyond repair. *Liquidation is to be accomplished as rapidly as possible consistent with obtaining the best possible realization upon the available assets and without undue waste by needless or fruitless litigation.*"

Id. at 851-52 (emphasis added). *See also In re Flight Transp. Corp., supra,* at 1135 (citing *In re Blair).*

Thus, Petitioners err in asserting that the Court of Appeals has applied a standard which is in conflict with a decision of this Court involving a bankruptcy liquidation case. While the Court of Appeals has recognized and followed the basic standards established by this Court in *TMT Trailer, supra,* it has consistently applied those standards in a less stringent manner in bankruptcy liquidation cases for the reasons articulated above.

Petitioners have cited a line of cases decided by the Fifth Circuit for the proposition that there is a conflict of authorities between federal courts of appeals relative to the applicability of this Court's holding in *TMT Trailer, supra.* Petition at p.14.[1] None of the cases cited by Petitioners, however, involve liquidation bankruptcies.[2]

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[1]The cited cases include:

Matter of Jackson Brewing Co., supra (Chapter X reorganization); *In re: Corrugated Container Anti-Trust Litigation,* 643 F.2d 195 (5th Cir. 1981), *cert. denied,* 456 U.S. 998 and 456 U.S. 1012 (1982) (class action suit under the Clayton Act) and *the Matter of Aweco, Inc.* 724 F.2d 293 (5th Cir. 1984) *cert. denied,* 105 S.Ct. 1984) (reorganization case under Chapter 11 of the Bankruptcy Code).

[2]Petitioners allege that the Ninth Circuit has rejected the standards implemented by numerous other federal courts of appeals, including the Eighth Circuit.

However, Petitioners' assertions are refuted by the decision in the case of *Matter of Orrin A. Ericson,* 6 Bankr. 1002, 1010 (D. Minn. 1980) (that court has presumably applied the law applicable in the Eighth Circuit). In that Chapter XI reorganization case, the district court affirmed the bankruptcy court's approval of a settlement agreement. The court considered the question of whether the strict and elaborate *TMT Trailer* standard was applicable in a Chapter XI case and stated as follows:

> "Finally the appellants argue that the bankruptcy court failed to conduct a 'strident and piercing inquiry into the reasonableness of the settlement,' and that it was required to explain in detail how it weighed the strengths and weaknesses of the case.

Consequently, the distinctions between the standard applicable in bankruptcy reorganization as opposed to liquidation cases, as articulated above, apply in those Fifth Circuit cases as well.

In addition, Petitioners contend that the Ninth Circuit is in conflict with other federal courts of appeals because it does not recognize that, in considering whether a settlement is fair and reasonable, the probability of success on the merits is the most important factor. See Petition at p.24. The fact that one court may choose to put

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> In support of their position, they cite [*TMT Trailer*] [citation omitted]. However, the level of scrutiny of the compromises involved in that case does not apply here. *TMT Trailer* dealt with an intricate corporate reorganization under Chapter X of the Bankruptcy Act. The policies underlying Chapter X and Chapter XI are vastly different. Chapter X is designed for large, publicly-held corporations and contains many elaborate safeguards for creditors and stockholders. Chapter XI is designed for small businesses and sacrifices many safeguards in the interest of speed and efficiency. *See generally Securities & Exchange Commission v. American Trailer Rentals Co.*, 379 U.S. 594, 603-07, 85 S.Ct. 513, 518-20, 13 L.Ed.2d 510 (1965). Against this background, a detailed statement of reasons is more appropriate for Chapter X proceedings than for Chapter XI proceedings. *Cf. In re Blair*, 538 F.2d 849 (9th Cir. 1976) (held that dictates of *TMT Trailer* do not apply in liquidation bankruptcy context)."

Hence, that court found that the level of scrutiny of the compromise involved in the *TMT Trailer* case is not applicable to that Chapter XI case, notwithstanding that they are both reorganization cases. The Court cites the decision of the Ninth Circuit in the case of *In re Blair* as support for its conclusion. In light of the distinction drawn between Chapter XI and Chapter X reorganization cases, it appears that if faced with evaluating a compromise in a liquidation case, the Eighth Circuit would undoubtedly draw the same distinction as the Ninth Circuit between liquidation and reorganization cases and apply the standard of the Ninth Circuit as articulated in *In re Blair*. Thus, no conflict between the standard of the Ninth Circuit and other federal courts of appeals in liquidation bankruptcy cases has been demonstrated, or is known to Respondents.

greater emphasis on one of the many factors being considered than may another court, however, does not constitute a conflict between those courts. All of the factors must be considered based upon the circumstances of each individual case.

Accordingly, it cannot be concluded that the Ninth Circuit has rendered a decision in this case which is in conflict with the decision of another federal court of appeals on exactly the same matter. The Petitioners ignore, much less cite any authority for, the proposition that the distinction drawn between the applicable standards of review in bankruptcy liquidation as opposed to reorganization cases as articulated by the Ninth Circuit is without merit.

Even if, arguendo, the more stringent standards which might be imposed in certain Chapter X cases were applicable to the present case, the substantial record compiled after five days of extensive hearings held in connection with approval of the Settlement Agreement is more than sufficient to establish that the trial court considered the matter in the context of a full and complete record. It was appropriately satisfied as to the complexity and doubtful outcome of litigating the disputes which were compromised through the Settlement Agreement. The Settlement Agreement was reasonable, given the particular circumstances of the case and all of the other required factors.

C. The Court of Appeals Properly Applied the Correct Standard for This Bankruptcy Liquidation Case

Petitioners assert that by affirming the decision of the lower courts in this case, the Court of Appeals has failed to properly apply the applicable standards for reviewing the fairness of a compromise. They base this assertion on the grounds that the Bankruptcy Court purportedly misallocated the burden of proof, entered "boilerplate" find-

ings of fact and conclusions of law unsupported by the evidence, and conducted no so-called cost-benefit analysis. These allegations are without merit.

The Court of Appeals recognized that the Bankruptcy Trustee, as the party proposing the Compromise, had the burden of persuading the Bankruptcy Court that the Compromise is fair and equitable and should be approved. *A & C,* 784 F.2d at 1381. The Court of Appeals stated:

> "It is clear from the record that the trustee met this burden. The bankruptcy court held five days of hearing on the trustee's application for compromise. During the hearings, the bankruptcy court weighed the evidence presented, heard testimony on the fairness of the compromise, and considered the objections presented by the appellants." *Id.*

The Court of Appeals further stated as follows:

> "The record reflects the careful consideration given to the compromise by the bankruptcy court and the inordinate amount of expertise which went into the ultimate compromise approval." *Id.*

Petitioners' assertions regarding the inadequacy of the evidence before the Bankruptcy Court are unfounded. Not only did there exist the quantum of evidence necessary under the law to support the Bankruptcy Court's Compromise Order, there was abundant and convincing evidence in support therof. That substantial disputes existed was established through testimony at the hearing on the Trustee's Application for approval of the Settlement Agreement and can hardly be denied in light of the detailed description contained in the Settlement Agreement. The evidence established that the Settlement Agreement was recommended by the Trustee and approved by the Bankruptcy Court after five days of exhaustive hearings, notice of which was given to all interested

parties, and which resulted in an extensive evidentiary record. Petitioners participated actively in those hearings, and, at the conclusion thereof, filed briefs in support of their position.

That the Settlement Agreement was fair, reasonable and in the best interests of the bankruptcy estate is demonstrated both by economic benefits to be received by the estate pursuant to the Settlement Agreement and a clear consensus of witness testimony presented at the hearings. None of these matters was rebutted by competent evidence.

The Trustee testified that he had applied his approximately 25 years of experience and expertise as an attorney specializing in insolvency, bankruptcy, receiverships and trustee matters. In addition, he testified that the disputes (particularly described in the Settlement Agreement) which were resolved through the Compromise were extremely complex and involved areas of substantial disagreement as to fact and law between the parties to the Settlement Agreement. There was no contrary evidence presented. It was also the Trustee's testimony that further efforts in litigating these disputes would be expensive and time-consuming. There was no contrary evidence.

The Trustee testified that he believed the Settlement Agreement to be in the best interests of the bankruptcy estate, based upon the improved position granted the estate as to stock ownership in K & K, the uncertainties of the litigation it resolved and because it paved the way for an earlier distribution to A & C's creditors than might otherwise be the case. These latter two points were disputed by objectors, but the Court's ruling constituted a determination that the evidence supported the Trustee's contentions. The Trustee also testified that the 1982 Compromise was, in his view, the best that could be reached under the circumstances. The record establishes

that the Trustee's evaluation of the 1982 Compromise commenced immediately after his appointment and was based upon lengthy investigation and research both by him personally and particularly through his counsel, including interviews conducted with approximately two dozen individuals, and that the Trustee properly relied upon the work done by his counsel in that connection.

Carl Albert, the president of K & K, a company with substantial net worth, himself an experienced attorney and business executive, testified that in his opinion as an officer of a party and as a percipient witness to the negotiations, the 1982 Compromise was the result of extensive arm's length negotiation and was the best possible under the circumstances from K & K's standpoint. As of the date of the settlement, the Trustee had acquired a substantial stock interest in K & K through the successful resolution of litigation to terminate a voting trust relative to said stock. Continuing litigation was distracting the management of K & K from conducting its business; conservation of assets was being prejudiced and legal fees were "hemorrhaging the corporation." The Settlement was, in his opinion, necessary to resolve these problems. Although Petitioners, without authority or reason, have attacked the Trustee, arguing that he erred in permitting the directors of K & K to participate in negotiations (Petition at pp. 28 & 29), Mr. Albert's testimony refutes such contentions. Obviously, the Directors negotiated on behalf of K & K, while the Trustee acted on behalf of A & C, which was a principal, but not sole shareholder in K & K. Each was a party and the separate interests of each entity were properly, scrupulously and independently represented.

James V. Looby, counsel for K & K, agreed that the Settlement Agreement was the product of extensive arm's-length negotiation between A & C's Trustee, K & K

and the Kane and Kelly parties and stated his educated opinion and belief that it was in the best interests of all parties. Mr. Looby further testified that there would be material tax-related and other disadvantages to attempting to liquidate the assets of K & K while the Trustee was actively litigating the then pending disputes.

Except as to Petitioners, the Trustee's recommendation was not opposed by any of the numerous creditors of the estate, including those represented at the hearing. Mid-Jersey Trucking Industry Local 701 Pension Fund, the single largest unsecured creditor of these bankruptcy estates (holder of an allowed unsecured claim of $3,250,000), filed with the Bankruptcy Court a Memorandum of Points and Authorities dated June 2, 1982 in support of the Compromise.[3]

The very detailed Settlement Agreement, the foregoing testimony, the Court's substantial experience in this particular bankruptcy case, together with substantial additional evidence before the Bankruptcy Court, provided the basis for the cost-benefit analysis which was conducted. Further, the Bankruptcy Court was aware that the approval of the Compromise obviated the difficult and expensive prospect of attacking the Bankruptcy Court's Order approving the 1977 Compromise which was a result

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[3]That Memorandum, which was filed at the conclusion of the hearings on the Compromise, stated that the vast majority, in both number and amount, of creditors supported the position of the Trustee regarding the Compromise. It further stated that said claimant remains convinced after hearing the evidence adduced by the Objectors that the Settlement Agreement is in the best interest of the Estates" and "is the best resolution available under the circumstances." Furthermore, counsel for the claimant made a statement on the record at the hearing and expressed its support for the Settlement Agreement.

sought by Petitioners.[4] The Bankruptcy Court similarly was aware of the substantial, expensive and time consuming litigation which was settled pursuant to the 1982 Compromise and the doubtful outcome of that litigation.

There was substantial benefit to the estate resulting from the Settlement Agreement and this was one of the many factors considered by the Court pursuant to its cost-benefit analysis. Pursuant to the terms of the Settlement, the bankruptcy estate was to receive, *inter alia,* property of substantial value from Kane and Kelly as follows: (A) transfer to the Trustee of 90,000 shares of K & K stock, valued by the Trustee at the hearing on the Application of approximately $1,000,000; (B) resignation of Kane and Kelly as officers of K & K; (C) return to K & K of approximately $160,000 in indemnity funds held by counsel for Kane and Kelly or entities controlled by them; and (D) release by Kane and Kelly of all known claims against K & K and its officers, directors, *et al.*

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[4]Petitioners asserted that a weakness in the 1982 Settlement was the failure by the Trustee to give great weight to the value of certain claims against the other parties to the settlement, which claims had been previously expressly released in a court-approved settlement in 1977, during the Chapter XI phase of the case, particularly claims arising out of the acquisition by K & K of property from A & C. The record reflects that the Trustee had determined that it was imprudent on balance to attack a final court order some two years old, which had never been appealed, upon which the parties appeared to have acted in reliance, when weighed against the principle of finality and the benefits of the 1977 Compromise. The Trustee's opinion was that any claims of A & C against Kane, Kelly and K & K arising out of the original property transfers appeared to have been expressly released pursuant to the terms of the 1977 Compromise, which is made expressly binding upon successor trustees. The Trustee noted that the 1977 Compromise had been approved by the Bankruptcy Court in a final order entered after contested hearings in which the instant Petitioners also participated and which they approved.

The Findings of Fact and Conclusions of Law in general, and, in particular, Findings of Fact Nos. 9, 10 and 17 and Conclusions of Law Nos. 4 and 5, establish that the decision reached by the Bankruptcy Court was based upon its consideration of all of the appropriate factors designated by applicable case law.

In addition, the comments made on the record by the Bankruptcy Judge at the hearings demonstrated that it was his constant and conscious concern and intent that Martin, Mosher and the LAC be given a full and fair hearing in connection with the Settlement Agreement.[5] The record in the Bankruptcy Court, as discussed above and elsewhere herein, establishes that the Trustee presented substantial evidence to support the proposed settlement and to refute each of the arguments raised by Petitioners. Petitioners did not succeed in rebutting or modifying the direct testimony of the Trustee's various witnesses on cross-examination. Similarly, Petitioners put forward little if any evidence from which a conclusion contrary to that of the Trustee's witnesses could possibly be drawn.[6]

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[5]On the first day of the hearings the Bankruptcy Judge expressed his concern as follows: "I'm not going to fence Mr. Noble in, I think he should have a full hearing." At the conclusion of the fifth day of hearings, a substantial portion of which were devoted to objectors' own examination and presentation of their case, the Bankruptcy Judge again expressed this concern and intent when he invited the parties to file briefs in support of their respective positions and made the following remark in response to the Trustee's counsel's efforts to bring the hearing to a conclusion: "Mr. Gill, I have leaned over backwards in this hearing to make certain that there was a full and fair hearing." At the conclusion of the five days of hearings, numerous and voluminous briefs were filed, which included discussions regarding the benefits expected to be realized by the estate.

[6]Petitioners assign grievous error to the Court in excluding testimony of Petitioners' witnesses Kit Lokey and Roland M. At-

Respondent believes that the Bankruptcy Court's Compromise Order was not merely justified by the evidence presented at trial, but was indeed compelled by it. The Settlement Agreement was clearly reasonable given the particular circumstances of this case. Whether or not the Settlement was provident, there was certainly no abuse of discretion on the part of the Bankruptcy Court in entering the Order approving the Settlement Agreement or by either the District Court or Court of Appeals in affirming that Order. Accordingly, the Court of Appeals properly applied the correct standard for this bankruptcy liquidation case. No basis exists for granting the writ of certiorari sought by Petitioners.

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tenborough. The record, however, makes it clear that there was no error at all and certainly no prejudicial error. The record reflects that the Trustee's counsel successfully moved to exclude the expert testimony of Mr. Lokey, who was expected to testify that, in his opinion, the ESOP stock was undervalued. There was no issue insofar as the Trustee shared objectors' view that the ESOP stock was undervalued. Therefore Mr. Lokey's testimony would not have in any way advanced the case of the proponents or objectors. That is, one of the disputes resolved by the Compromise was the *Trustee's* allegation that said stock was undervalued. Petitioners argued that the Trustee settled his claim too cheaply.

As to Mr. Attenborough's testimony, the Trustee agreed that the offer of proof relative thereto made by Petitioners' (objectors') counsel would be accepted as a true representation of that to which the witness would testify. The Court disregarded that testimony because it had been offered by the objectors for the purpose of establishing a legal conclusion, the Court's determination ultimately reflected in Conclusion of Law 6, that rights to the ESOP shares would vest absent a Determination Letter. The decision of the Bankruptcy Court to disregard the testimony of Mr. Attenborough is supported by the case of *Owen v. Kerr-McGee Corp.*, 698 F.2d 236 (5th Cir. 1983) (the court stated that the Advisory Committee notes to Rule 704 of the Federal Rules of Evidence make it clear that the rule is not intended to allow a witness to give legal conclusions).

D. The Court of Appeals Properly Found That the Bankruptcy Court Rendered Its Opinion in a Thorough and Procedurally Proper Manner

(1) The Bankruptcy Court Entered Findings of Fact And Conclusions of Law That Are Supported by the Evidence

Petitioners have alleged that the Bankruptcy Court failed to make findings of fact which (1) reflect a reasoned analysis of the settlement, and (2) permit an appellate court to make a proper review. If this assertion were correct, it would not justify certiorari. *See* Section III.A., *supra*. The Court of Appeals, however, held that the record, when reviewed as a whole, supports a determination otherwise. *A & C, supra*, at 1382. It was correct.

Rule 52(a) of the Federal Rules of Civil Procedure provides that: "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The findings and conclusions are neither clearly erroneous nor an abuse of discretion where they are based on substantial evidence. *In re Blair, supra*, at 851.

In the instant case, it is only necessary that the findings of fact and conclusions of law reflect the matters actually addressed by the Bankruptcy Court at the hearing on the Compromise and that their reflection in the findings of fact and conclusions of law comply with the requirements delineated in the case of *In re Blair*, and the other applicable cases.

The Bankruptcy Court analyzed the potential for prosecution of the claims released by the Settlement Agreement and found this course of action: "[c]omplex, uncertain of result and potentially expensive . . . in terms of attorneys' fees, court costs, and delay required, which

delay could reasonably be expected to result in damage to the estate or detriment to creditors." The record supports the Bankruptcy Court's findings of fact and conclusions of law, which are sufficiently comprehensive.

The Court of Appeals stated that the Bankruptcy Court had attached to its findings and conclusions a copy of the Settlement Agreement upon which it relied, and which it approved. The Court went on to state as follows:

> "The settlement agreement, which is twenty-five pages in length, sets forth in detail the claims which it purports to settle, the parties involved, the valuation of the corporate assets, the identity of shareholders and the number of outstanding shares, the cost-benefit analysis of the relative merits of pursuing or settling the various claims, and the conditions which would enable the trustee to proceed with the liquidation."

A & C, supra, at 1383.

The Court of Appeals further stated as follows:

> "It is clear from the record before us, which is well over four thousand pages with reporter's transcripts amounting to nearly one thousand pages, that the bankruptcy judge was informed and had apprised himself of all facts necessary to make an intelligent and independent judgment that the compromise was fair and equitable. The litigation was filed in the bankruptcy court in 1976, and the judge who approved the compromise had handled the matter since 1980. Thus, in addition to the settlement agreement, the bankruptcy judge had heard testimony on the value of the corporation's assets, the terms of the ESOT (which appellants challenge), and was well aware of the claims being asserted by appellants in their Adversary Prodeeding D, which was before the

> court. There is clear support in the record for our affirming the findings of fact with respect to the approval of the compromise." *Id.*

Thus, notwithstanding the fact that the Bankruptcy Court did not write an elaborate opinion explaining why it deemed the Compromise to be fair, reasonable and adequate, there is abundant support in the record to support the approval of the Compromise. Accordingly, the Court of Appeals properly affirmed the findings of fact with respect to the approval of the Compromise. However, even if there was some error in the Court of Appeal's conduct, it would certainly not be of a magnitude that would entitle Petitioner to the writ of certiorari which is sought.

(2.) A Specific Holding on Each Objection Was Not Required

Despite Petitioners' arguments, as discussed above, the Bankruptcy Court was not required to expand its hearing to the full scope discussed in the *TMT Trailer, supra*, case and, consequently, the Bankruptcy Court was not obligated to make more elaborate responses to each and every objection. The Court of Appeals noted that Petitioners failed to cite any case to support their allegation that the Bankruptcy Court's conduct constituted an abuse of discretion. Moreover, the Court stated that:

> "[W]here, as here, the evidence on the issue of the Compromise was thorough and comprehensive, the Court was familiar with the entire record and touched all material bases of the creditors' objections, and held directly, expressly or by necessary implication, on every substantial point of contention, the Court's approval of the Compromise does not constitute an abuse of discretion."

A & C, supra, at 1384 (citing *Jackson Brewing, supra*, at 312).

Thus, the conduct of the Court of Appeals in disposing of the various objections to the Compromise does not provide a basis for granting a writ of certiorari.

(3.) Any Inaccuracy in the Individual Findings of Fact and Conclusions of Law Constituted, at Most, Harmless Error

Petitioners take particular exception to certain individual findings of fact and conclusion of law. The findings of fact and conclusions of law entered in this case are based upon substantial evidence. However, even if any of these are other than strictly correct, the harm to anyone is questionable, and they would not, under any circumstances, rise to the level of clear error or an abuse of discretion. In addition, there has been no showing, nor can one be made, that any such inaccuracies give rise to a right in Petitioners to review by this Court.

E. Conclusion

Petitioners have failed to establish that the Court of Appeals has decided an important issue of federal law in a manner which is clearly in conflict with applicable decisions of this Court. Neither have they established that the Court of Appeals has rendered a decision which is clearly in conflict with the decision of another federal court of appeals on exactly the same matter. Based upon the foregoing reasons, the petition for writ of certiorari should be denied.

WHEREFORE, Respondent prays that the Court affirm the Order of the Court of Appeals, which upheld the Order of the District Court affirming the Bankruptcy Court's approval of the Settlement Agreement and related proceedings.

Dated: September 12, 1986

Respectfully submitted,

DANNING, GILL, GOULD, DIAMOND
& SPECTOR
DAVID A. GILL*
DAVID HERSKOVITZ

By _____
DAVID A. GILL
Counsel for Respondent Gilbert Robinson, as Trustee in Bankruptcy of A & C Properties

*Counsel of Record

APPENDIX

APPENDIX A

[784 F.2d 1377]

In re A & C PROPERTIES, Debtors.

William W. MARTIN, et al., Plaintiffs,

Superseded by Gilbert Robinson,
Plaintiff in Intervention,

v.

William E. KANE, Barbara Kelly, K & K
Properties Inc., and Investors
Replacement, Inc., Defendants.

William W. MARTIN, et al.,
Objectors-Plaintiffs-Appellants,

v.

Gilbert ROBINSON, Trustee in
Bankruptcy, Plaintiff in
Intervention, Appellee.

No. 84-6071.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 4, 1985.

Decided March 17, 1986.

As Amended on Denial of Rehearing
May 13, 1986.

Appeals were taken from an order of the United States District Court for the Central District of California, Robert M. Takasugi, J., affirming an order of the Bankruptcy Court, John E. Bergener, J., compromising bankruptcy controversy and approving a settlement agreement entered into between bankruptcy trustee and debtors. The Court of Appeals, Barnes, Senior Circuit Judge, held that record supported finding that agreement between bank-

ruptcy trustee and debtors settling dispute arising from a transfer of debtors' assets and liabilities in exchange for stock was fair and equitable; evidence on issue of compromise was thorough and comprehensive, bankruptcy court was familiar with entire record and touched all material bases of creditors' objections, and court held directly, expressly, or by necessary implication on every substantial point of contention.

Affirmed.

1. **Bankruptcy — 446(6)**

Bankruptcy court's order approving trustee's application to compromise controversy is reviewed under abuse of discretion standard.

2. **Bankruptcy — 467(4)**

Where district court summarily affirms bankruptcy court's orders without setting forth separate finding of fact and conclusions of law, district court is deemed to have adopted those of bankruptcy court.

3. **Bankruptcy — 252**

In determining fairness, reasonableness, and adequacy of a proposed settlement agreement, bankruptcy court must consider probability of success in litigation; difficulties, if any, to be encountered in matter of collection; complexity of litigation involved, and expense, inconvenience, and delay necessarily attending it; and paramount interest of creditors and a proper deference to their reasonable views in the premises.

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4. Bankruptcy — 252

While creditors' objections to a compromise agreement must be afforded due deference, such objections are not controlling.

5. Bankruptcy — 252

While bankruptcy court must preserve rights of creditors, it must also weigh certain factors to determine whether proposed compromise is in best interest of bankrupt estate.

6. Bankruptcy — 252

Record supported finding that agreement between bankruptcy trustee and debtors settling dispute arising from a transfer of debtors' assets and liabilities in exchange for stock was fair and equitable; evidence on issue of compromise was thorough and comprehensive, bankruptcy court was familiar with entire record and touched all material bases of creditors' objections, and court held directly, expressly, or by necessary implication on every substantial point of contention.

Stephen W. Holohan, Noble, Campbell & Uhler, Los Angeles, Cal., for objectors-plaintiffs-appellants.

David A. Gill, Danning, Gill, Gould, Joseph & Diamond, Los Angeles, Cal., for plaintiff in intervention, appellee.

Appeal from the United States District Court for the Central District of California on Appeal from the United States Bankruptcy Court for the Central District of California.

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Before BARNES, GOODWIN and BOOCHEVER, Circuit Judges.

BARNES, Senior Circuit Judge:

William W. Martin ("Martin"), Robert E. Mosher ("Mosher"), and the Legal Action Committee for Marlin Investments ("LAC"), appeal from the district court affirmance of the bankruptcy court order compromising the bankruptcy controversy and approving a settlement agreement entered into between the bankruptcy trustee and the debtors. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I. FACTS

This appeal arises from a lengthy and complex proceeding before the bankruptcy court. For purposes of explanation, we must review the factual background leading to the filing of the petition for bankruptcy by the debtors in this action.

Between 1969 and 1975 Mosher and Martin invested in some or all of eighteen joint ventures (hereinafter "the A & C Entities" or "A & C"), each of which consisted of one or more limited partnerships, organized and sold by general partner, Barry Marlin ("Marlin"). The limited partnerships were usually offered as tax-sheltered investments. The A & C Entities owned various rental properties, leasehold interests and promissory notes receivable, some of which were subject to liabilities.

On January 1, 1976, K & K Properties, Inc. ("K & K"), a newly-formed Delaware corporation organized and controlled by William Kane ("Kane") and Barbara Kelly ("Kelly"), assumed the management of the A & C properties. The assets and liabilities of the A & C Entities were

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transferred to K & K in exchange for eighty percent of the K & K stock. Kane and Kelly retained the remaining twenty percent. Marlin remained a general partner and manager of the A & C Entities.[1]

On August 19, 1976, the A & C Entities filed for protection under Chapter XI of the Bankruptcy Act. Numerous disputes arose between the appellants and other investor-creditors, the A & C Entities, K & K, and Kane and Kelly, involving the rights of the various parties in connection with the transaction in which K & K acquired the assets of the A & C Entities. The Legal Action Committee for Marlin Investments ("LAC") was formed by Mosher and Martin to represent the interests of some of the A & C Entities investor-creditors.

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The bankruptcy court approved a compromise on December 21, 1977, ("1977 Compromise") which was negotiated by the parties to this appeal, and actively participated in by appellants. The 1977 Compromise provided for the resolution of disputes which arose from the 1976 agreement in which K & K acquired the assets of the A & C Entities in exchange for stock. Its terms provided (a) for the distribution of some of the K & K stock owned by Kane and Kelly to K & K, and (b) for the previously

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[1]Marlin was later relieved of his duties as general partner and joint venture manager. Criminal proceedings were brought against him in several jurisdictions as a result of his participation in various allegedly fraudulent real estate and financial schemes. These proceedings have resulted in Marlin's conviction and sentence to ten years in prison. However, Marlin is not a party to these appeals. Although several California state court actions were commenced by him and against him, they are not the subject of review herein.

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established voting Trust[2] to exercise its previously established voting rights. In addition, A & C Entities released K & K and Kane and Kelly individually, for any claims or liabilities arising from any association between the parties. As a result of this compromise, certain investor-creditors, including the appellants, sued K & K for breach of contract and fraud.

In an effort to settle and satisfy the claims of the investor-creditors, several plans of arrangement were negotiated and filed with the bankruptcy court. Pursuant to the terms of the 1977 Compromise, to solicit votes of the K & K shares held by the A & C Entities, in order to approve a plan of arrangement for the settlement and satisfaction of the creditors' claims, a K & K Prospectus and proxy solicitation were prepared on August 29, 1978. This Prospectus and proxy solicitation, along with a registration statement, were filed with the SEC in 1980. The Prospectus was prepared by K & K, and included an explanation of the transactions which had occurred, the status of the bankruptcy proceedings, and a financial statement which purported to represent the value of K & K's assets.

During the pendency of the bankruptcy proceedings, in March of 1978, K & K authorized the establishment of an Employment Stock Ownership Trust ("ESOT"). Appellants allege that the provisions of this ESOT, coupled

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[2]This voting trust, established in May, 1976, was entered into by A & C and K & K, and provided that the A & C Entities would transfer their collective shares in K & K (approximately eighty percent of the outstanding shares) to a voting trustee to be selected by the advisory committee of K & K. This committee consisted of the K&K Board of Directors and twenty-two delegates from the A & C Entities.

with the valuation of the K & K shares, were inequitable to the investor-creditors.

On February 20, 1979, Martin filed a complaint, designated "Adversary Proceeding B," for declaratory relief in the bankruptcy court, on behalf of himself and all other creditors, against K & K, Kane and Kelly. On June 4, 1979, Martin filed an amended complaint, designated as "Adversary Proceeding D," which requested relief, based upon allegations of fraud and violations of federal securities laws. The bankruptcy court eventually dismissed this action with prejudice on October 18, 1983. Appellants Martin, Mosher and the LAC had filed other similar litigation dealing with the same matters which were the subject of the Adversary Proceeding D.

After numerous attempts to implement and approve a plan of arrangement had failed, the bankruptcy judge filed an order on September 10, 1979, adjudicating the debtors (A & C Properties, et al.) bankrupt under Article X of the Bankruptcy Act, and appointed Gilbert Robinson ("Robinson") as trustee to supervise the liquidation and distribution of the assets of K & K to its shareholders. Various plans of arrangement were filed in an effort to liquidate the assets of K & K and distribute the proceeds to the shareholders. Robinson became engaged in litigation in both state and bankruptcy courts. He attacked the Voting Trust and sought to gain control of K & K Properties through voting the stock of K & K owned by the A & C Entities.

The bankruptcy court, upon Robinson's unopposed motion, entered an order on July 8, 1981, authorizing him to vote the share of the A & C Entities (which shares constituted a majority of the total outstanding shares in K & K), and to elect individuals to the board of directors.

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These persons all of whom were approved by the Bankruptcy Court, were "independent directors" proposed by Robinson.

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On January 6, 1982, Robinson entered into a settlement agreement with K & K, Kane, Kelly, and Kane and Kelly Associates to provide for the distribution of the K & K assets to the shareholders. The trustee filed an application with the bankrupcty court to compromise the controversy, a notice of this application was signed by the bankruptcy court on January 26, 1982, and mailed to the creditors on February 4, 1982. On June 18, 1982, after numerous hearings on the matter, the bankruptcy court approved the trustee's application to compromise. The court on April 18, 1983, entered its order compromising the controversy, thereby adopting the terms of the settlement agreement, and it entered its findings of fact and conclusions of law to support its order. Appellants filed timely appeals to the district court from the findings and orders of the bankruptcy court. The district court entered its order on June 22, 1984, summarily affirming the bankruptcy court in all respects, finding that the bankruptcy court had committed no error of law and had not committed an abuse of discretion. The appellants filed a timely appeal to this court from the district court's affirmance of the bankruptcy court. Both the district court and this court have jurisdiction to review the decision of the bankruptcy court under 28 U.S.C. §§ 1293 and 1334.[3]

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[3]The effective date of these Code sections was April 1, 1984. The appeals to the district court were filed prior to the effective date of these statutes, on April 28, 1983, August 23, 1983, October 27, 1983 and November 8, 1983. However, Congress provided that during the interim period prior to the effective date of 28 U.S.C. §§ 1293 and

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II. DISCUSSION

The sole issue raised on appeal is whether the district court erred in affirming the bankruptcy court's approval and implementation of a 1982 settlement agreement between the bankruptcy trustee and the debtors where the agreement was objected to by certain creditors.

In an appeal from the district court's affirmance of a decision of the bankruptcy court, our role is essentially the same as that of the district court, and we are, in essence, reviewing the final order of the bankruptcy court. *In re Global Western Development Corp.,* 759 F.2d 724, 726 (9th Cir. 1985) (per curiam).

[1] We review the bankrupcty court's findings of fact under the "clearly erroneous" standard and its conclusions of law *de novo. In re Global Western,* 759 F.2d at 726. However, the bankruptcy court's order approving the trustee's application to compromise the controversy is reviewed for an abuse of discretion. *In re Transcontinental Energy Corp.,* 764 F.2d 1296, 1298-99 (9th Cir. 1985); *Matter of Walsh Construction, Inc.,* 669 F.2d 1325, 1328 (9th Cir. 1982); *In re Blair,* 538 F.2d 849, 851 (9th Cir. 1976).

A. Validity of the Compromise

Under Section 27 of the Bankruptcy Act, 11 U.S.C. § 50 (1976) (repealed 1978),[4] a trustee " 'may, with the ap-

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1334, the appellate jurisdiction of the court would be the same as that provided for in these statutes. Pub.L. 85-598, Title IV, § 405(c)(2), 92 Stat. 2685 (1978).

[4]Although the order approving the compromise was entered after the repeal of the authorizing statute, since the original bankruptcy petition was filed prior to its repeal, the Bankruptcy Act of 1898 governs. *See In re Transcontinental,* 764 F.2d at 1298 n. 2. Even

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proval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate.' " *In re Transcontinental,* 764 F.2d at 1298 (citation omitted), *Matter of Walsh,* 669 F.2d at 1328. The purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims. *Matter of Walsh,* 669 F.2d at 1328 (citing *In re California Associated Products Co.,* 183 F.2d 946, 949-50 (9th Cir. 1950)). The law favors compromise and not litigation for its own sake, *In re Blair,* 538 F.2d at 851, and as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision must be affirmed. *See Matter of Walsh,* 669 F.2d at 1329. Thus, on review, we must determine whether the settlement entered into by the

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trustee was reasonable, given the particular circumstances of the case. *In re Equity Funding Corporation of America,* 519 F.2d 1274, 1277 (9th Cir. 1975).

Appellants argue several grounds for reversing the bankruptcy court's approval of the compromise agreement. We address each separately, in turn.

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assuming that Section 27 does not apply to this order, 11 U.S.C. § 105(a) (1984) allows the court to issue any order, process or judgment necessary or appropriate to carry out the provisions of Title 11.

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1. Burden of Proof and Burden of Persuasion Required to Support Approval of Compromise.

[2] Appellants first challenge the bankruptcy court's conclusion of law, affirmed by the district court,[5] which provided that where a compromise has been negotiated in good faith by a trustee, and is reasonably believed by him to be the best compromise negotiable under the facts of the given case, the court should approve the recommended settlement. Appellants allege that such a conclusion not only misstates the law, but that it places the burden on the objectors to prove that the settlement agreement is not fair, equitable and in the best interest of the creditors.

It is clear that there must be more than a mere good faith negotiation of a settlement by the trustee in order for the bankruptcy court to affirm a compromise agreement. The court must also find that the compromise is fair and equitable. *See, e.g., Citibank, N.A. v. Baer,* 651 F.2d 1341, 1345-46 (10th Cir. 1980).

[3] In determining the fairness, reasonableness and adequacy of a proposed settlement agreement, the court must consider:

> (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount

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[5]Where the district court summarily affirms the bankruptcy court's orders without setting forth separate Finding of Fact and Conclusions of Law, the district court is deemed to have adopted those of the bankruptcy court. *Chase Capital Corp. v. Bumb,* 336 F.2d 1000, 1001 (9th Cir. 1964), *cert. denied,* 380 U.S. 934, 85 S.Ct. 941, 13 L.Ed.2d 821 (1965).

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> interest of the creditors and a proper deference to their reasonable views in the premises.

In re Flight Transportation Corporation Securities Litigation, 730 F.2d 1128, 1135 (8th Cir. 1984) (citations omitted), *cert. denied.* ____ U.S. ____, 105 S.Ct. 1169, 84 L.Ed.2d 320 (1985). *Accord, Matter of Jackson Brewing Co.,* 624 F.2d 605, 607 (5th Cir. 1980) (court must review the particular facts and circumstances with adequate detail and explanation to determine (1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and (3) all other factors bearing on the wisdom of the compromise). The record reflects the careful consideration given to the compromise by the bankruptcy court and the inordinate amount of expertise which went into the ultimate compromise approval. *See In re Blair,* 538 F.2d at 851 n. 1.

The trustee, as the party proposing the compromise, has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved. *In re Hallet,* 33 B.R. 564, 565-66 (Bankr.D.Me. 1983). It is clear from the record that the trustee met this burden. The bankruptcy court held five days of hearing on the trustee's application for compromise. During the hearings, the bankruptcy court weighed the evidence presented, heard testimony on the fairness of the compromise, and considered the objections presented by the appellants.

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[4,5] Appellants argue that the bankruptcy court had ignored their objections to the compromise and had, in essence, shifted the burden of proof to them to show that

the compromise was not negotiated in good faith. However, appellants' argument is not supported by the record. In addition, while creditors' objections to a compromise must be afforded due deference, such objections are not controlling, *In re Transcontinental,* 764 F.2d at 1299; *accord, In re Hallet,* 33 B.R. at 566; *In re The General Store of Beverly Hills,* 11 B.R. 539, 541 (Bankr. 9th Cir. 1981), and while the court must preserve the rights of the creditors, it must also weigh certain factors to determine whether the compromise is in the best interest of the bankrupt estate. *Matter of W.T. Grant Co.,* 4 B.R. 53, 69 (Bankr.S.D.N.Y. 1980).

Any possible inference in the conclusion of law that all that is required for the bankruptcy court to affirm an agreement is the good faith negotiation of a settlement by the trustee is clarified by conclusion of law number 4 which states:

> The Bankruptcy Court has discretion to and should approve the compromise recommended by the Trustee in Bankruptcy after a hearing held upon appropriate notice, where it appears, as it does in this case, that expense, benefits, hazards and complexity of litigation, potential delay and waste of time, effort and expense might otherwise result.

The conclusion of law which appellants challenge did not shift the burden for production of proof regarding the fairness of the settlement agreement. Any error in the conclusion was not material when read in conjunction with the other findings and conclusions which the bankruptcy court made.

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2. **Sufficiency of Findings of Fact.**

The second claim of error asserted by appellants is that the bankruptcy court failed to make findings of fact which (1) reflect a reasoned analysis of the settlement, and (2) permit an appellate court to made a proper review. However, the record, when reviewed as a whole, supports a determination otherwise.

Appellants argue that the holdings in *Protective Committee for Independent Stockholder of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) (*"TMT Trailer"*), and *Matter of Jackson Brewing Co., supra,* require the bankruptcy court to "analyze and describe the merits and essential elements of both: 1) the Agreement as a whole; and, 2) the various claims which it purported to resolve." Appellants allege that the findings of fact and conclusions of law are "boiler plate," and as such are defective since the bankruptcy court failed to include a cost-benefit analysis of the relative merits of pursuing or settling the various claims which the trustee surrendered, or any evaluation of the consideration which he purportedly received. We disagree.

In *TMT Trailer,* the court determined that

> [t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the

[p. 1382]

> wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

390 U.S. at 424-25, 88 S.Ct. at 1163-64. However, the Court gives us no specific direction on how much specificity or detail the bankruptcy court is required to put into its findings of fact or conclusions of law in order to comply with the Supreme Court's language.

[p. 1383]

In our case, the bankruptcy court's findings of fact and conclusions of law are rather general. However, the bankruptcy court attached to these findings and conclusions a copy of the settlement agreement upon which it relied, and which it approved. The settlement agreement, which is twenty-five pages in length, sets forth in detail the claims which it purports to settle, the parties involved, the valuation of the corporate assets, the identity of shareholders and the number of outstanding shares, the cost-benefit analysis of the relative merits of pursuing or settling the various claims and the conditions which would enable the trustee to proceed with the liquidation. Appellate review is made more difficult by the lower court's failure to write an opinion explaining why it deemed the compromise to be fair, reasonable and adequate. *See In re Flight Transportation Corp.,* 730 F.2d at 1136. However, where the record supports approval of the compromise, the bankruptcy court should be affirmed. *See e.g., Id.*

It is clear from the record before us, which is well over four thousand pages with reporter's transcripts amounting to nearly one thousand pages, that the bankruptcy judge was informed and had apprised himself of all facts

necessary to make an intelligent and independent judgment that the compromise was fair and equitable. The litigation was filed in the bankruptcy court in 1976, and the judge who approved the compromise had handled the matter since 1980. Thus, in addition to the settlement agreement, the bankruptcy judge had heard testomony on the value of the corporation's assets, the terms of the ESOT (which appellants challenge), and was well aware of the claims being asserted by appellants in their Adversary Proceeding D, which was before the court. There is clear support in the record for our affirming the findings of fact with respect to the approval of the compromise.

3. Fairness of the Settlement Agreement.

Appellants claim that the bankruptcy court abused its discretion in approving the settlement agreement and compromise "in the absence of a record which provides an adequate analysis of its merits." A court may approve a compromise or settlement only when it is "fair and equitable." *Matter of Aweco, Inc.,* 725 F.2d 293, 298 (5th Cir.), *cert. denied,* ____ U.S. ____ ,105 S.Ct. 244, 83 L.Ed.2d 182 (1984). An approval of a compromise, absent a sufficient factual foundation which establishes that it is fair and equitable, inherently constitutes an abuse of discretion. *Id.,* 105 S.Ct. at 299. However, the record in the case before this court is replete with factors which support the bankruptcy court's approval of the compromise.

This is not the case where the bankruptcy judge reached for his stamp and marked "approved" without some party supplying concrete facts. *See Matter of Aweco,* 725 F.2d at 300. Appellants argue that neither the court nor the trustee was sufficiently familiar with the ESOT or the Adversary Proceeding D. However, considerable evi-

[p. 1383]

dence was presented on the ESOT, including its terms and provisions and its valuation.

The application to compromise the controversy and the settlement agreement, along with the testimony of hearings on the application, indicate that the court made a full and fair independent assessment of the wisdom of the compromise. *Cf. Matter of Boston & Providence Railroad Corp.,* 673 F.2d 11, 12 (1st Cir. 1982). The trustee's application and the settlement agreement set forth in detail the claims pending against the bankrupt estate, and an evaluation of those claims. Furthermore, the findings and order of the bankruptcy court indicate that it made an independent evaluation from the trustee's application and settlement agreement, and from the rest of the proceedings before it. *Cf. id.* at 12-13. The bankruptcy court did not abuse its discretion in approving the compromise.

4. **Consideration of Creditors' Objections.**

Appellants contend that the bankruptcy court's failure to respond to each objection which they raised in their "objection to application to compromise controversy," constituted an abuse of discretion. However, appellants cite no cases directly supporting this proposition.[6]

[p. 1384]

Creditors' objections to a compromise must be afforded deference. *In re Transcontinental,* 764 F.2d at 1299; *ac-*

---

[6]Appellants cite *Mandujano v. Basic Vegetable Products, Inc.,* 541 F.2d 832, 836 (9th Cir. 1976), to support their argument that the bankruptcy court abused its discretion in failing to respond to each of their objections. However, that case involved a settlement in a class action suit filed under Title VII of the Civil Rights Act of 1964. The language in *Mandujano* is apparently limited to Title VII actions.

[p. 1384]

cord, In re Hallet, 33 B.R. at 566; *In re The General Store of Beverly Hills,* 11 B.R. at 541. In addition, the bankruptcy court is obligated to preserve the rights of the creditors. *Matter of W.T. Grant Co.,* 4 B.R. at 69. However, where, as here, the evidence on the issue of the compromise was thorough and comprehensive, the court was familiar with the entire record and touched all material bases of the creditors' objections, and held directly, expressly or by necessary implication, on every substantial point of contention, the court's approval of the compromise does not constitute an abuse of discretion. *Matter of Jackson Brewing Co.,* 624 F.2d at 612.

5. Exclusion of Evidence and Testimony.

Lastly, appellants argue that the bankruptcy court improperly limited their inquiry and refused to hear testimony on matters which they claim were necessary to the court's arriving at a fair and equitable compromise. Appellants assert that (1) their inquiry regarding the negotiating process with respect to the settlement agreement was relevant to the court's determination of fairness and that the court improperly limited their inquiry, and (2) the bankruptcy court improperly refused to hear testimony on the ESOT, which was necessary to the settlement of claims. These arguments have, at best, little merit.

The bankruptcy judge may give weight to the opinions of the trustee, the parties, and their attorneys. *In re Blair,* 538 F.2d at 851. Furthermore, the court may exclude evidence which is relevant where such evidence creates undue delay, waste of time or needless presentation of cumulative evidence. Fed.R.Evid. 403. In this case, although the bankruptcy court may have limited appellants' questioning of witnesses with respect to the negotiating

[p. 1384]

process involved in the settlement agreement, the court did not prohibit such questioning altogether. Furthermore, with respect to the ESOT, considerable evidence was presented and appears in the record. The court permitted testimony on the ESOT and its effect on the settlement agreement. The court did not abuse its discretion in limiting testimony on these matters.

III. CONCLUSION

Appellants have "failed to articulate a coherent explanation of the threat posed to [their] claim by the compromise." *In re Transcontinental Energy Corp.,* 764 F.2d at 1299. Furthermore, when we consider the lengthy delay occasioned by this appeal and the additional attorneys' fees and appellate costs, this appeal, as a whole, may be an example of asset wasting. *In re Blair,* 538 F.2d at 851.

[6] A finding that the compromise is fair and equitable is supported by the record. "As long as the approved plan is fair and equitable, we cannot reject it in favor of a plan that is more equitable." *Citibank, N.A. v. Baer,* 651 F.2d at 1346.

The judgments below are severally AFFIRMED.

APPENDIX B

Chronology of Events

The following chronological outline is designed to assist in placing the various significant events into proper perspective:

Date	Event
January, 1976	Conveyance of property to K&K
May, 1976	Creation of Voting Trust
August 19, 1976	Chapter XI filed
December 21, 1977	1977 Compromise approved by Bankruptcy Court
October 13, 1978	18 individual Chapter XI cases of A & C entities consolidated
March, 1979	Voting Trust purportedly extended until May 12, 1981
March 12, 1979	Adversary "B" filed in Bankruptcy Court; later dismissed with leave to amend
June 4, 1979	Adversary "D" filed in Bankruptcy Court
June 19, 1979	Marlin litigation filed in Los Angeles Superior Court
August 20, 1979	Kane and Kelly filed action against Martin, Mosher and LAC in Los Angeles Superior Court; Martin, Mosher and LAC filed cross-complaint against Kane, Kelly and K&K ("Martin Litigation")
September 10, 1979	Debtor adjudged bankrupt; Trustee appointed; Trustee commences investigation of case; Trustee commences negotiations with Kane and Kelly

Date	Event
December 28, 1979	Trustee files action in Bankruptcy Court to contest Voting Trust and to assert Trustee's right to vote and other rights in and to shares
February, 1980	Kane and Kelly demand return to them of 2,000 shares conditionally ceded to K & K under the 1977 Compromise; K & K complies with such demand
March 14, 1980	Bankruptcy Court judgment regarding Voting Trust
September 16, 1980	Martin, Mosher and LAC file motion to compel Trustee to intervene in Adversary "D" action
May 8, 1981	Superior Court Minute Order entered regarding Voting Trust; Trustee for the first time becomes entitled to vote the K & K shares owned by A & C
May 21, 1981	Trustee seeks Bankruptcy Court approval of slate of independent directors
June 4, 1981	Order entered by Los Angeles Superior Court directing that ownership, voting and other rights be transferred to Trustee
July 8, 1981	Bankruptcy Court enters order approving slate of independent directors; independent directors seated; independent directors commence investigation of and join in negotiations with Kane and Kelly
August 28, 1981	Mosher action filed in U.S. District Court
January 26, 1982	Trustee files Application to Compromise Controversy
January 26, 1982	Trustee files Conditional Intervention in Adversary "D"

Date	Event
January 26, 1982	Trustee files, as plaintiff-in-intervention, Motion to Dismiss Adversary "D"
February 23, 1982	Bankruptcy Court holds hearing on Application to Compromise Controversy (day one)
April 5, 1982	Bankruptcy Court holds hearing on Application to Compromise Controversy (day two)
April 8, 1982	Bankruptcy Court holds hearing on Application to Compromise Controversy (day three)
April 12, 1982	Bankruptcy Court holds hearing on Application to Compromise Controversy (day four)
April 26, 1982	Bankruptcy Court holds hearing on Application to Compromise Controversy (day five)
June 18, 1982	Bankruptcy Court issues written Memorandum Decision approving Application to Compromise Controversy; entered on June 21, 1982
June 30, 1982	Settlement Agreement would by its express terms lapse if not accepted on or before this date
April 18, 1983	Bankruptcy Court enters Findings of Fact and Conclusions of Law in connection with approval of Settlement Agreement
April 18, 1983	Bankruptcy Court enters "Order Compromising Controversy"
April 18, 1983	Bankruptcy Court enters Order authorizing Trustee to file dismissal of Adversary Proceeding "D" subject to Court approval

Date	Event
August 8, 1983	Bankruptcy Court enters Order granting Appellants' "Motion for Stay of Enforcement of Order Entered on April 18, 1983" conditioned upon posting a bond in the amount of $1,000,000; bond was never posted
October 21, 1983	Court orders dismissal of Adversary "D"
June 22, 1984	U.S. District Court enteres Order affirming Bankruptcy Court Orders
September 20, 1984	Martin cross-complaint dismissed by Los Angeles Superior Court for lack of prosecution
March 17, 1986	Ninth Circuit Court of Appeals issues Opinion affirming Bankruptcy Court Orders
May 13, 1986	Ninth Circuit Court of Appeals issues Order Denying Rehearing and Amending Opinion

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On September 12, 1986, I served the within Opposition to Petition for a Writ of Certiorari in re: "William W. Martin vs. Gilbert Robinson" in the United States Supreme Court October Term 1986, No. .....;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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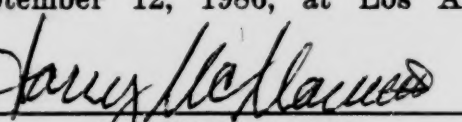
All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on September 12, 1986, at Los Angeles, California



LARRY MC MANUS

86-206

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-

WILLIAM W. MARTIN, ROBERT E. MOSHER, and the Legal Action Committee for Marlin Investments,
Petitioners,

v.

GILBERT ROBINSON, Trustee in Bankruptcy,
Respondent.

WILLIAM EVERETT KANE AND BARBARA KELLY,
Interested Parties and Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 12, 1986

QUESTION PRESENTED

Whether the Court of Appeals and the District Court correctly determined that the Bankruptcy Court made an informed and independent judgment that the compromise was fair and equitable and that the Bankruptcy Court did not abuse its discretion in approving the compromise.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were:

Gilbert Robinson, Trustee in Bankruptcy, Appellee
William Everett Kane, Interested Party
Barbara Kelly, Interested Party
K & K Properties, Inc., Interested Party
William W. Martin, Objector, Plaintiff, Appellant
Robert E. Mosher, Objector, Appellant

William Everett Kane and Barbara Kelly file and serve this Opposition to Petition for Writ of Certiorari as Respondents pursuant to Supreme Court Rule 19.6.

Petitioners' opening brief contains a list of numerous individuals who are described as constituting the members of the "so-called" Legal Action Committee for Marlin Investments and Petitioners allege that it is on behalf of those parties, in addition to certain others set forth above, that objections have been made and the instant Petition for Writ of Certiorari is being pursued. However, there has never been a judicial finding (i) that the alleged Legal Action Committee for Marlin Investments actually exists, (ii) that the numerous individuals listed are actually members of said committee, or (iii) that any of the numerous individuals listed even concur in the position taken by Petitioners. Respondents further believe that the Legal Action Committee has no standing in this liquidation bankruptcy case.

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IN THE

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OCTOBER TERM, 1986

No. 86-

WILLIAM W. MARTIN, ROBERT E. MOSHER, and the Legal Action Committee for Marlin Investments,
Petitioners,

v.

GILBERT ROBINSON, Trustee in Bankruptcy,
Respondent.

WILLIAM EVERETT KANE AND BARBARA KELLY,
Interested Parties and Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Petitioners' statement of the case in their opening brief sets forth many factual allegations unsupported by the record, and outright distortions and misstatements of alleged facts. These not only distract from but are irrelevant to the question properly before this Court, which is to determine whether a writ of certiorari should be granted. Respondents merely wish to state, for the record, that they do not concur with Petitioners' version of the facts.

SUMMARY OF ARGUMENT

The Bankruptcy Court made an informed and independent judgment, after several hearings, that the compromise at issue was fair and equitable. Both the District Court and the Court of Appeals found that this was the case, based upon the Bankruptcy Court's Findings of Fact and Conclusions of Law and upon the extensive record, consisting of well over four thousand pages, compiled in this action. Thus, there is no important question of federal law or deviance from established authority for which to grant this Petition for Writ of Certiorari.

There is also no "most important factor" test in any circuit for determining whether a bankruptcy compromise should be approved. Petitioners' attempt to create the appearance of a division among the circuits on this ground is a mere subterfuge at getting a second crack, after losing the first time, at a hearing on the merits of the compromise.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY DETERMINED THAT THE BANKRUPTCY COURT MADE AN INFORMED AND INDEPENDENT JUDGMENT THAT THE COMPROMISE WAS FAIR AND EQUITABLE AND THAT THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN APPROVING THE COMPROMISE

A. The Court Of Appeals And The District Court Correctly Determined That The Bankruptcy Court Made An Informed And Independent Judgment That The Compromise Was Fair And Equitable Under All Relevant Circumstances

Petitioners seek from this Court a Writ of Certiorari in the hopes of reversing the decision of the Ninth Circuit Court of Appeals which affirmed the United States District

Court's affirmance of the bankruptcy judge's decision to approve the 1982 Settlement Agreement. The Bankruptcy Act, Section 27, 11 U.S.C. § 50, however, grants broad authority to the trustee to compromise any claims arising in the administration of the bankruptcy estate under such terms as he deems reasonable. *In Re California Associated Products Co.,* 183 F.2d 946 (9th Cir. 1950). The only requirements for approval of the compromise are that the trustee demonstrate that the controversy is of the type that should be resolved by compromise, and that the proposed compromise is reasonable under the circumstances. *In Re Equity Funding Corp. of America,* 519 F.2d 1274 (9th Cir. 1975). There has been no suggestion that the disputes covered by the 1982 Settlement Agreement ought not to be settled. Petitioners merely attack the District Court's and the Court of Appeals' affirmance of the Bankruptcy Court's decision that this particular settlement was a reasonable one.

The bankruptcy judge, in approving a compromise, need not determine that all claims compromised were necessarily valid or that the litigation could not have been resolved to the benefit of the estate. As the Court in *In Re California Associated Products Co., supra,* at 949-950 stated:

> "As to what the ultimate outcome of the litigation would have been, we are not now [on appeal] directly concerned. The primary purpose of a compromise settlement is to avoid the necessity of determining sharply contested and dubious issues. It is sufficient if we can say that the outcome would have been doubtful. If the claim of the appellant had substantial foundation and was not clearly invalid as a matter of law then there was no abuse of discretion on the part of the referee in approving the compromise."

The bankruptcy judge is merely required to determine that the compromise is reasonable:

> "In undertaking an examination of the settlement, we emphasize that this responsibility of the bankruptcy judge, and ours upon review, is not to decide the numerous questions of law and fact raised by appellants but rather to canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness', *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.), *cert. denied sub nom. Benson v. Newman,* 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972)."

In Re W. T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983).

The factors to be considered in deciding whether to approve a compromise in bankruptcy proceedings have been summarized as follows:

> "(1) The probability of success in the litigation with due consideration for the uncertainty in fact and law,
>
> (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience, and delay, and
>
> (3) All other factors bearing on the wisdom of the compromise."

Matter of Jackson Brewing Co., 624 F.2d 605, 607 (5th Cir. 1980) ("*Jackson II*") (Citing *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414 (1968) ("*TMT Trailer*").)

Petitioners' principal assertion is that certain stringent standards must be met by trial and appellant courts, both in the approval and in the review of bankruptcy settlements, to verify that an informed and independent judgment is made by the court in approving bankruptcy settlements. These standards would include a more elaborate hearing on the approval of a settlement agreement, constituting a mini-trial, thereby enabling petitioners to inquire

into various matters which the Bankruptcy Court found to be inappropriate for the hearing which it held. Petitioners primarily base their assertion upon *TMT Trailer* and *Jackson II*. However, both of these cases involve a Chapter X reorganization of a public corporation, and do not require a mini-trial as petitioners would impose on the courts. Furthermore, the opinion below by the Ninth Circuit recognized, to the extent they are applicable, the import of these decisions to a Chapter VII liquidation.

This Court's decision in *TMT Trailer* involved a corporate reorganization under Chapter X of the Bankruptcy Act of 1898, in which the District Court approved an amended plan of reorganization which compromised certain claims and excluded the original shareholders from participating in the reorganized company. The Supreme Court held that it was error to affirm the District Court's approval of compromises of claims against the debtor, and that it was error to affirm the District Court's judgment that the debtor was insolvent, when that judgment was rendered without considering the future estimated earnings of the reorganized company. In its ruling that it was error to affirm the District Court's approval of compromises against the debtor, this Court noted that the record did not support the approval:

> "If, indeed, the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based. The deficiency in this case, however, is not merely a formal one. The evidence referred to by respondent is analyzed at greater length in the margin[19]. Here it is enough to say that to the extent that the record contained solid facts of the sort necessary for appraising the merits of the claims against M-S, virtually all of them point to the probable existence of

valid and valuable causes of action. Balancing these facts are nothing but bold assertions to the contrary and general conclusions for which foundations no where appear." 390 U.S. at 437-439 (footnote omitted).

Thus, in *TMT Trailer,* the trial judge used only conclusory language in determining that the settlement in the Chapter X proceeding was fair and equitable, and, additionally, the record was devoid of facts to support the trial judge's conclusions. The degree of scrutiny and the trial court's documentation of it, however, will and should vary according to the nature of the proceedings. In a reorganization proceeding, the settlement agreement must be carefully scrutinized to ensure that the reorganized corporation has sufficient assets to become viable once it comes out of bankruptcy. In contrast, less scrutiny is needed when a corporation is being terminated in a liquidation proceeding, since all of its assets are being distributed to the various creditors.

This distinction was recognized by the Ninth Circuit in *In Re Blair,* 538 F.2d 849 (9th Cir. 1976). In deciding *In Re Blair,* the Ninth Circuit expressly considered the question of whether the dictates of *TMT Trailer,* a Chapter X reorganization proceeding, applied to a compromise approved in a liquidation proceeding pursuant to Section 27 of the Bankruptcy Act (11 U.S.C. § 50). The Court stressed:

"Appellant asserts that even in a liquidation bankruptcy compromise proceeding, there must be a mini-trial on the merits of claims sought to be compromised. We reject the notion. The decision as to whether there should be a mini-trial in a liquidation bankruptcy as to the merits of the compromised claims and defenses is best left to the sound discretion of the bankruptcy judge upon an application and showing of necessity by the interested parties or by creditors of the bankrupt.

> This is not the same as a Chapter X proceeding and there are sound reasons for drawing the distinction. A corporate reorganization is a continuing business affair requiring close supervision and affecting many interested parties. The success or failure of a reorganization may hinge upon the very compromise at issue.[2] A liquidation bankruptcy is a terminal affair. The bankrupt's financial affairs are beyond repair. Liquidation is to be accomplished as rapidly as possible consistent with obtaining the best possible realization upon the available assets and without undue waste by needless or fruitless litigation."
>
> * * *
>
> "[2] In *Protective Committee For Independent Stockholders, etc. v. Anderson, supra,* 390 at 423, 88 S.Ct. at 1163, the lower court judgment 'was rendered without considering the future estimated earnings of the reorganized company.' Such a vital issue is not involved in a liquidation bankruptcy compromise".

538 F.2d at 851-852. *See also In Re Flight Trans. Corp. Securities Litigation,* 730 F.2d 1128, 1135 (8th Cir. 1984) (citing *In Re Blair); In the Matter of Orrin A. Ericson,* 6 BRW 1002, 1010 (D. Minn. 1980)(citing *In Re Blair).*

The case of *Jackson II, supra,* which is cited by Petitioners, is also a Chapter X corporate reorganization compromise proceeding, and consequently, is also inapposite to the instant appeal in connection with the scope of the hearing that is required.

However, even if the standards imposed by *TMT Trailer* and *Jackson II* are applicable to the present case, the Bankruptcy Court met these standards by analyzing the potential for prosecution of the claims released by the settlement agreement and found this course of action to be:

> "complex, uncertain of result and potentially expensive ... in terms of attorneys fees, court costs and delay required, which delay could reasonably be expected to result in damage to the estate or detriment to creditors." (Petitioners' Appendix G, p. 69.)

Further, the record compiled after five days of extensive hearings held in connection with approval of the settlement agreement is more than sufficient to establish both the complexity and doubtful outcome of litigating the disputes which were compromised through the settlement agreement, and that the settlement agreement was reasonable given the particular circumstances of the case and other required factors. As the opinion below of the Ninth Circuit noted:

> "It is clear from the record before us, which is well over four thousand pages with reporter's transcripts amounting to one thousand pages, that the bankruptcy judge was informed and had apprised himself of all facts necessary to make an intelligent and independent judgment that the compromise was fair and equitable. The litigation was filed in the bankruptcy court in 1976, and the judge who approved the compromise had handled the matter since 1980. Thus, in addition to the settlement agreement, the bankruptcy judge had heard testimony on the value of the corporation's assets, the terms of the ESOT (which appellants challenge), and was well aware of the claims being asserted by appellants in their Adversary Proceeding D, which was before the court. There is clear support in the record for our affirming the findings of fact with respect to the approval of the compromise." *In Re A & C Properties,* 784 F.2d 1377, 1383 (9th Cir. 1986).

B. There Is No "Most Important Factor" Test For Determining Whether A Bankruptcy Compromise Should Be Approved

Petitioners erroneously assert that the second, fourth, fifth, seventh and eighth circuits have adopted a "most important factor" test for determining whether a bankruptcy compromise should be approved. This "most important factor" is asserted to be the probability of success on the merits. (Opening Brief, p. 24.)

However, neither the various circuit decisions cited by Petitioners nor this Court's decision in *TMT Trailer* supports this rather bizarre "most important factor" test for bankruptcy proceedings. Specifically, Petitioners cite *In Re General Tire & Rubber Securities Litigation,* 726 F.2d 1075 (6th Cir. 1984). However, the *General Tire* case involved court approval of a settlement of several derivative action suits, in which the trial court exercised its own business judgment in approving the settlements. Similarly, the second case cited by Petitioners, *Parker v. Anderson,* 667 F.2d 1204 (5th Cir. 1982), involves approval of a settlement of a class action employment discrimination suit. Further, all of the cases of the various circuits referred to in *Parker,* which Petitioners conveniently leave out of their quote (Opening Brief, p. 24), are class action cases involving employment discrimination and anti-trust claims. None of the cases Petitioners cite in support of their "most important factor" test involve bankruptcy proceedings, and those bankruptcy decisions which are otherwise cited by Petitioners do not even mention such a test.

While it may be true that in derivative and class actions the most important factor in determining whether or not to approve a settlement is the likelihood of success on the merits, these actions differ significantly in character from bankruptcy settlements. In a class action suit, the only concern is with the well being of the class members. However, in a bankruptcy proceeding, the trial court or bankruptcy court is primarily concerned with the health and welfare of the estate. 11 U.S.C. § 50 (1976); *see, In the Matter of Walsh Const., Inc.,* 669 F.2d 1325, 1328 (9th Cir. 1982).

Furthermore, the position advocated by Petitioners, that one factor be considered paramount over all others, runs contrary to this Court's decision in *TMT Trailer.* This Court in *TMT Trailer* stressed:

> "Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." 390 U.S. at 424.

The *TMT Trailer* test, therefore, is essentially a balancing test in which "the district court must consider all factors bearing on the fairness of the settlement . . ." *In Re Flight Transp. Corp. Securities Litigation, supra,* at 1135. To impose a "most important factor" test would unduly burden and complicate the court's determination of whether to approve a bankruptcy settlement. In fact, none of the bankruptcy cases cited by Petitioners require such an analysis.

C. The Court Of Appeals And The District Court Correctly Determined That The Bankruptcy Court Did Not Abuse Its Discretion In Approving The Compromise

The bankruptcy courts enjoy wide latitude to approve those settlement agreements they deem to be proper, and their decision will not be overturned unless there is an abuse of discretion. The closeness of the trial court judge to the proceedings at hand provides one of the major foundations for this rule. As the court in *In The Matter of Walsh Const., Inc.*, 669 F.2d 1325, 1328 (9th Cir. 1982) noted:

> "The reasonableness of a compromise is determined by the particular circumstances of each case. [Citation omitted]. Because the bankruptcy judge is uniquely situated to consider the equities and reasonableness of a particular compromise, approval or denial of a compromise will not be disturbed on appeal absent a clear abuse of discretion. [Citations omitted.]"

Accord, In the Matter of Aweco, Inc., 725 F.2d 293, 297 (5th Cir. 1984); *Matter of Ocobock*, 608 F.2d 1358, 1360

(10th Cir. 1979); *In Re Albert-Harris, Inc.*, 313 F.2d 447, 449 (6th Cir. 1963).

Petitioners contend that because each and every one of their multitudinous, redundant or irrelevant objections did not merit specific attention in the Court's written findings, some wrong was done to them. As previously discussed, the Bankruptcy Court was not required to expand the hearing on the settlement agreement to that of a mini-trial.

Petitioners, in their opening brief, rely heavily upon the case of *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976) to support their assertion that the Bankruptcy Court failed to properly dispose of Petitioners' objections. That case, however, involves a settlement of a class action suit filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.*, and 42 U.S.C. 1981, in which the Court indicates that the more stringent requirements of that case are not applicable in the instant case:

> "Observance of these procedures will impose a burden on trial courts required by Rule 23(e) to approve dismissals or compromises of class actions intended to vindicate Title VII rights. This added burden, however, is necessary to assure that valid objections are voiced, to inform the trial court, and to create a reviewable record. [citation omitted]. The interests Title VII is designed to secure are sufficiently important to warrant procedures which minimize the risk of those interests being prejudice by the normal pressures to settle complex litigation affecting a substantial part of the work force of an employer." 541 F.2d at 836.

Petitioners would therefore have Rule 23 of the Federal Rules of Civil Procedure and the heightened burden required in a Title VII action apply to the instant case, even though this is not a class action. However, Rule 52(a) of the Federal Rules of Civil Procedure governs here, and

"does not require the court to make elaborate findings . . . upon all such facts as will present every possible view of the case." *In Re Imperial Irrigation Dist.*, 38 F.Supp. 770, 772 (S.D. Cal. 1941), *aff'd*, 136 F.2d 539 (9th Cir. 1943), *cert. denied*, 321 U.S. 787 (1944). A finding of such essential facts as lay a basis for the decision is sufficient. *Id.* Furthermore, findings need not assert the negative of rejected propositions. *Schilling v. Schwitzer-Cummins Co.*, 142 F.2d 82 (D.C. Cir. 1944); 5 A *Moore's Federal Practice* (2d ed.) 52.06[1].

Moreover, "findings [of the trial court] are to be construed liberally in support of a judgment or order . . . Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn . . ." *Id.*, citing *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175, 179 (7th Cir. 1948), *aff'd* 336 U.S. 956 (1949). See *Transport Equipment Co. v. Guaranty State Bank*, 518 F.2d 377 (10th Cir. 1975) (where different inferences may be drawn, the Court of Appeals will not substitute its judgment for that of the trial court); *Uniroyal, et al. v. Mumford*, 454 F.2d 1233, 1234 (7th Cir. 1972) (Court of Appeals must look to evidence most favorable to trial court's findings and to such reasonable inferences as may be drawn therefrom). In the case of *Manning v. Jones*, 349 F.2d 992, 996 (8th Cir. 1965), the Court stated the rule as follows:

> "[A] district court's findings of fact must be liberally construed and found to be in consonance with the judgment if the judgment has support in the record evidence . . . This is so even if the findings are not as specific or detailed as might be desired".

Even the failure of a trial court to comply with the requirements of FRCP 52(a) does not require reversal "if a full understanding of the questions presented may be had without the aid of separate findings." See *Magna Weld*

Sales Co. v. Magna Alloys & Research Pty., Ltd., 545 F.2d 668 (9th Cir. 1976). Findings are not a jurisdictional requirement of appeal but only aid appellate courts in reviewing the decision below and defects therein may be waived where the error is not substantial in the particular case. *Rossiter v. Vogel*, 148 F.2d 291, 293 (2d Cir. 1945).

Thus, the Bankruptcy Court was not obligated to make elaborate responses to each and every one of Petitioner's objections. In *Jackson II, supra*, the Court noted that specific and detailed responses did not need to be made directly or expressly on every point of contention:

> "The evidence on this issue and others before the District Court was thorough and comprehensive. Clearly the Court was familiar with the entire record, touched all material basis of the objections of the creditors, and held directly, expressly or by necessary implication on every substantial point of contention. The District Court properly satisfied the requirements of *TMT Trailers* . . . The Court's approval of the arrangement constitutes not an abusive discretion, but an uncompromising examination and approval of this carefully constructed compromise.
>
> As did the district judge, we hope this brings an end to this never ending controversy." *Id.* at 612.

It is difficult to imagine a more appropriate summation of the instant case.

The Bankruptcy Court's disposition of Petitioners' objections was not carried out in a fashion that was clearly erroneous or which constituted an abuse of discretion. The Findings of Fact and Conclusions of Law adopted by the Bankruptcy Court specifically held that all the elements necessary for approval of a compromise existed. As previously stated, these elements include existence of substantial disputes of the type amenable to compromise and the

reasonableness of a proposed compromise given the particular circumstances of the case. *In Re Equity Funding Corp. of America, supra,* at 1227.

The record supports the Bankruptcy Court's Findings of Fact and Conclusions of Law, which are sufficiently comprehensive. Whether or not more elaborate Findings of Fact and Conclusions of Law are required in Chapter X cases pursuant to the cases of *TMT Trailer* and *Jackson II,* as has previously been discussed, the law does not require that a mini-trial be held in connection with the compromise in a bankruptcy liquidation case. It is only necessary that the Findings of Fact and Conclusions of Law reflect the matters actually addressed by the bankruptcy court at the hearing, and are based on substantial evidence. Where, as here, the Findings of Fact and Conclusions of Law are based upon substantial evidence, there is no abuse of discretion and the Findings of Fact and Conclusions of Law are not clearly erroneous.

CONCLUSION

The Bankruptcy Court entered its order approving the compromise after a full evidentiary hearing, properly noticed to all parties. Indeed, the Bankruptcy Court rendered its decision in a thorough and detailed manner, after an additional hearing on challenges to the proposed findings and conclusions. The Bankruptcy Court thus evidenced a clear understanding of the standards governing approval of bankruptcy compromises as well as a full cognizance of the facts of the case. The compromise and dismissal orders were drawn in such a way as to meticulously safeguard the rights of all parties, including Petitioners. Not only has no error of law been demonstrated but there is no important question of federal law or deviance from established authority for which to grant this Petition.

Furthermore, there is no difference among the circuits as to the need for a bankruptcy court to make an informed

and independent judgment that a compromise is fair and equitable and to issue appropriate findings thereon. There is therefore no need or reason for this Court to grant the instant Petition for a Writ of Certiorari.

Dated: September 12, 1986.

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No. 86-206

Supreme Court, U.S.
FILED
SEP 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

William W. Martin, Robert E. Mosher, and the Legal Action Committee for Marlin Investments,

Petitioners,

v.

Gilbert Robinson, Trustee in Bankruptcy,

Respondent.

PETITIONERS' REPLY TO OPPOSITION OF RESPONDENT GILBERT ROBINSON, TRUSTEE IN BANKRUPTCY

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No. 86-206

In The

Supreme Court of the United States

October Term, 1986

REPLY TO OPPOSITION OF RESPONDENT GILBERT ROBINSON

INTRODUCTION

Apart from the Respondent Trustee's (the "Trustee") general and continuing statements that the record below contains data and analyses which he simply failed to present to the Bankruptcy Court, some other material misstatements and omissions are found throughout his Opposition. They therefore merit special consideration.

On page ii, the Trustee questions the standing of the Legal Action Committee ("LAC"). From that point forward, with one significant exception,[1] he refers to the LAC as the "so called Legal Action Committee."

In point of fact, the Trustee's counsel stipulated that the LAC members were Objectors, "well represented" at the "fairness hearings" after the Court itself had so stated. RT 1221:5-15; See: App. "A" hereto. The decision below recognized the LAC's status as an Appellant. *In re A & C Properties,* 784 F.2d 1377, 1378 (9th Cir. 1986); Appendix to Petition ("App. Pt.") 79.

Interrelated misstatements or omissions primarily understate what the Trustee gave up and overstate what he purportedly received under the 1982 Settlement Agreement (the "Agreement"). On page 4, the listing of claims omits: 1) any reference to the "Marlin lawsuit", mentioned in Recital "H" of the Agreement; 2) most of the claims mentioned in Recital "L"; and, 3) any reference to claims

[1]On page 21, the Trustee states that: "[i]t was his [the Court's] constant and conscious concern and intent that Martin, Mosher and the LAC be given a full and fair hearing. . . ."

arising out of mismanagement of K & K, summarily alluded to in Recital "N(7)". Cf. App. Pt. at 14 and 17-19.[2]

The Trustee asserts on page 5 that the "Agreement . . . recites in great detail the specifics of numerous disputes . . . and the reasons for said Settlement." Actually, it contains neither "great detail" regarding the disputes nor "the reasons for said Settlement". See: Pt. 15-16.

He next lists as a principal benefit of the Agreement: "transfer to the Trustee of 90,000 shares of K & K's stock, valued by the Trustee at approximately $1,000,000." On page 20, this Opposition adds that such valuation was given "at the hearing on the Application."

Two major things are wrong with those assertions. First, Petitioners' counsel obtained uncontradicted testimony from the Trustee that he did not know how to value K & K's stock. RT 957:16-958:21; 1363:21-1366:8. See: App. "B" hereto.

Furthermore, the Trustee did not gain 90.000 shares over what he had in September of 1979. As Recital "L" of the Agreement states in shorthand fashion, sometime after September 30, 1979: 1) Kane and Kelly took back 40,000 shares relinquished pursuant to the 1977 Compromise; and, 2) they caused 114,839 shares to be transferred to the purported ESOT for "per share prices which were substantially below fair market value."[3] App. Pt. at 17.

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[2]For descriptions of those omitted claims the Court is referred to pages 8 through 10 and 23 of the Petition herein and pages 45 through 48 of the Appendix thereto.

[3]Reading Recital "O" with Paragraph 1.3.3, one finds that 13,705 of those "ESOT shares" had purportedly vested in Kane and Kelly by December of 1981 and another 43,506 would vest by the express terms of the Agreement. App. Pt. 20 and 22; Pt. 9-11 and footnote 10 therein. According to the Trustee's own testimony, the price was some 62-80 cents per share. See Appendix B hereto at 4-5.

ARGUMENT

I. RESPONDENT HAS MISSTATED THE CRITERIA FOR GRANTING A WRIT OF CERTIORARI.

Both in his Statement of Questions Presented and in the second paragraph of his argument, the Trustee misstates two of the grounds for granting certiorari. There is, of course, no requirement that conflicts between a lower court's decision and a prior decision of this Court or prior decisions in other Circuits involve "identical" or "exactly the same" matters.

The reason for the Trustee's odd formulation is clear. Unless established general principles regarding the manner in which compromises must be presented to a lower court and then evaluated by that court and approved—and the standards governing their review on appeal—are not general principles at all, then he must face the fact that the principles laid down in *Protective Committee for Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414 (1968) ("TMT Trailer") were not followed in any of the proceedings below.

II. RESPONDENT HAS MISSTATED LEGAL PRINCIPLES GOVERNING EVALUATION OF COMPROMISES AND RECAST THE DECISION BELOW.

The Trustee vastly broadens both the meaning and the applicability of the Ninth Circuit's *dicta* in its *per curiam* opinion in a rather trivial bankruptcy case, *In re: Blair,* 538 F.2d 849 (9th Cir. 1976). He seeks to circumscribe the general principles regarding the approval of compromises laid down in *TMT Trailer* and consistently applied other than in the Ninth Circuit.

In order to justify the proceedings below, the Trustee must also rewrite the Ninth Circuit's decision herein. Although some portions of that decision below are confusing,

it at least paid lip service to *TMT Trailer*. Where the Court of Appeals first went astray was in not heeding the condemnation of "mere boilerplate" in the *TMT Trailer*.[4] Having done so, it compounded its error by: 1) glossing over major errors in the Bankruptcy Court's "boilerplate"; 2) misreading the Agreement, the "boilerplate" and the record and finding cost-benefit analyses in them which are not there; and, 3) setting too low and imprecise standards for the analyses required.

The principal mischief in *Blair* is its suggestion that *TMT Trailer* required a "mini-trial" while other bankruptcy proceedings require something less.[5] *In re: Blair, supra* at 852. Neither *TMT Trailer*, nor any of the numerous decisions which have followed it, have required anything which can be characterized as a "mini-trial", so the distinction is both incorrect and troublesome.[6]

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[4]In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-67 (1964), this Court had warned trial courts against slavishly adopting one party's findings and conclusions.

[5]The Ninth Circuit's decision in *Blair* does not support the overly expansive reading which has been given to it. The Court of Appeals in its *per curiam* disposition of that uncomplicated and relatively unimportant matter apparently did not intend to make a major pronouncement regarding bankruptcy law. *In re: Blair, supra* at 851.

[6]That *TMT Trailer* does not require anything which may be characterized as a "mini-trial" was recognized in *Newman v. Stein*, 484 F.2d 689, 691-2 (2d Cir. 1972):

"[W]e recognize that since '[t]he very purpose of a compromise is to avoid the trial of sharply disputed issues, . . .' the court must not turn the settlement hearing 'into a trial or a rehearsal of the trial' . . . . . Rather, in the words of the Supreme Court . . . it must reach an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated and 'form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.' "

When the Trustee erroneously states that Petitioners were asking for anything more than that he present sufficient data for the Court to make the requisite cost-benefit analysis and that it should then make such analysis, reasonably explained in a fashion permitting a meaningful review, he is seriously misstating their position. That *Blair* itself gave some recognition to the importance of such analysis is shown by the quotation on page 9 of the Opposition followed by a cryptic "Cf. Conclusion of Law No. 4." When one compares that Conclusion with the *Blair* language, it is readily apparent that Conclusion 4 is merely a hopeless jumble of words. Pt. 9, note 17.

The Trustee next gives a portion of a quotation from *Blair* followed by "Cf. Conclusion of Law No. 5." Restoring the part which the Trustee has omitted from its first sentence, it reads: "The Bankruptcy judge and the district court may, in a case such as this, give weight to the opinions of the Trustee, the parties, and their attorneys." That is very different from the referenced Conclusion which is materially wrong.[7]

The Trustee articulates the novel proposition that because various cases which followed *TMT* in one or more Circuits did not involve liquidation bankruptcies, then other Courts of Appeal would follow his expansive interpretation of *Blair* in liquidations. He overlooks the fact that *In re: W.T. Grant,* 699 F.2d 599, 605-6 (2d Cir. 1983), cited in the Petition, was not only a major liquidation bankruptcy which followed *TMT,* but contained a lengthy footnote 9 which justified the adoption of "most" of the proposed findings and conclusions on the limited ground that the

---

[7] "Where, as in this case, a compromise has been negotiated in good faith by a Trustee, and is reasonably believed by him to be the best compromise negotiable under the facts of a given case, the court should approve the recommended settlement." App. Pt. 72-3.

Bankruptcy Court also prepared its own 27 page analysis. The fact that the Eighth Circuit applied *TMT Trailer* in a failed Chapter XI proceeding, *In re: Flight Transportation Corp. Securities Litigation*, 730 F.2d 1128, 1135 (8th Cir. 1984) is not mentioned, but the Trustee cites an earlier District Court decision as "proof" that the Eighth Circuit would follow *Blair*.[8] The Trustee has failed to find any other decisions which adopt his expansive interpretation of *Blair* or validate Conclusions of Law 4 and 5.[9]

III. RESPONDENT WOULD CAST ASIDE A FUNDAMENTAL STANDARD FOR EVALUATION OF COMPLEX SETTLEMENT AGREEMENTS IN FAVOR OF VAGUE CRITERIA WHICH CANNOT BE APPLIED LOGICALLY AND CONSISTENTLY.

In two brief paragraphs on pages 14 and 15, the Trustee slides over the fact that he, the Bankruptcy Court and the Ninth Circuit have failed to apply the principle that an evaluation of the probability of success on the merits is of paramount importance in the evaluation of the fairness of

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[8]*Matter of Orrin A. Ericson*, 6 B.R. 1002, 1010 (D. Minn. 1980), illustrates the mischief which may be caused by artificial distinctions between proceedings under different sections of the Bankruptcy Act. In *Ericson*, which cited *Blair*, the District Court held that: "The policies underlying Chapter X is designed for large, publicly-held corporations. . . . *Chapter XI is designed for small businesses. . . .*" (Emphasis added). That distinction would come as something of a surprise to parties who have had interests in the reorganization proceedings of Continental Airlines and Johns-Manville.

[9]Even if there were any such cases in ordinary liquidations, they would be of doubtful applicability herein. *A & C Properties* involved a complex Settlement which affected interests in the stock, claims and control of a viable corporation, K & K Properties, having net assets of some $25,000,000 and not itself the subject of bankruptcy claims. There was clearly no terminal situation calling for a hasty liquidation.

any compromise. *TMT Trailer, supra* at 424-5.[10] The failure of the Trustee, his counsel and the courts in the proceedings below to follow the clear directions of this Court in *TMT Trailer* are the primary cause of the difficulties, expenses and delays in this matter.

What the Trustee does on pages 14 and 15 is concede that the Ninth Circuit does not recognize that, in considering whether a settlement is fair and reasonable, the probability of success on the merits is the most important factor. He also endorses the position taken in *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), i.e., that the relevant factors to be considered and the weight to be assigned to each in determining the fairness of compromises are to be divined by the court on a case by case basis without any meaningful standards for guidance. The result is to give such court virtually absolute discretion in approving settlements and to prevent meaningful appellate review.[11]

The foregoing position is contrary to the generally accepted rule articulated in *Newman v. Stein, supra* at 693.[12]

---

[10]As this Court has said:

"There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. . . . *TMT Trailer, supra* at 424.

[11]As the Court of Appeals said in *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 856 (D.C. Cir. 1978): "The absence of articulated standards, policies, or considerations—plus the absence of any reasoned explanation in this particular case—makes it impossible to decide whether or not there has been an abuse of discretion. . . ."

[12]"[V]ery likely all that is meant when appellate courts speak of the trial judge's discretion in this context is that in any case

(Continued on next page)

In the present matter, the absence of any cost-benefit analyses of the Agreement by either the Trustee or the Bankruptcy Court prevented the Ninth Circuit from determining whether the compromise came within a range of reasonableness.

IV. RESPONDENT'S OPPOSITION ESTABLISHES THAT HE GAVE NO COST-BENEFIT ANALYSIS.

The Trustee actually confirms that he gave no cost-benefit analysis. Beginning on page 17, he summarizes his case-in-chief. App. Pt. 56-61. He then notes that K & K's President believed that the Agreement was the "best possible under the circumstances from K & K's standpoint", but also admits the existence of a conflict of interest between the Trustee and the Directors that he had named.[13]

Additionally, the Trustee states that the Agreement was endorsed by a Teamsters' local which was the "largest *unsecured* creditor. . . ." (Emphasis added), adding a quotation from a Memorandum which it filed.[14]

(Continued from previous page)

there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion—and the judge will not be reversed if the appellate court concludes that the settlement lies within that range."

[13]"Obviously, the Directors negotiated on behalf of K & K, while the Trustee acted on behalf of A & C, which was a principal, but not sole, shareholder in K & K." See also: Opposition at page 3, last paragraph. Virtually all of the shares of K & K not held by the Trustee were held by Kane and Kelly, or purportedly held by the ESOT. App. Pt. 19-20.

[14]Such memoranda are not evidence of the costs and benefits of a compromise, nor was the Local able to represent what the "vast majority" of creditors believed. See: *TMT Trailer, supra* at 435-40 and note 9.

The Trustee next alleges that: "The very detailed Settlement Agreement, the foregoing testimony, the Court's substantial experience in this bankruptcy case, together with substantial additional evidence before the Bankruptcy Court, provided the basis for the cost-benefit analysis which was conducted." The cursory descriptions of the claims released are readily apparent. Certain testimony having no probative value as to costs and benefits has just been dealt with. As for "the Court's substantial experience," suffice it to say that this Court gave little, if any, weight to that factor *TMT Trailer*.

One is left with unspecified "substantial additional evidence" and the Trustee's brief testimony to support the purported "cost-benefit analysis". A decision which also involved a failed Chapter XI proceeding, recently stated the correct view of the weight accorded to the type of testimony by a trustee given below: "The best interests of creditors, however, requires more than a trustee's *ipse dixit* or request for reliance on his judgment." *In re: Lion Capital Group*, 49 B.R. 163, 190 (Bkcy. S.D.N.Y. 1985).[15]

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[15]The Bankruptcy Court sustained the Trustee's counsel's objection, on the ground of relevance, to the testimony of two of Petitioner's principal witnesses who were prepared to testify, respectively: 1) to the value of K & K's shares; and, 2) that shares could not vest in an ESOT absent a Determination Letter when the ESOP made the receipt of such a letter a condition of vesting. The latter testimony was relevant to the question of the ease of recovery of the "ESOT shares" misappropriated by Kane and Kelly. Such testimony was offered as a rebuttal to the testimony of K & K's counsel which formed the basis of Finding of Fact 16 and Conclusion of Law 6 which "opened the door". R.T. 1384:17-1391:19; 1475:12-1485:15. See also: *In re Corrugated Container Anti-Trust Litigation*, 643 F.2d 195, 215 (5th Cir. 1981).

V. RESPONDENT VIRTUALLY ADMITS THAT THE BANKRUPTCY COURT: 1) MADE UNSUPPORTED FINDINGS AND CONCLUSIONS; AND, 2) FAILED TO GIVE PROPER CONSIDERATION TO PETITIONERS' OBJECTIONS.

In the absence of any evidentiary support for a cost-benefit analysis, the Trustee has cut the text of Finding of Fact 9 on page 20 and recast the Court's Finding as to what the Trustee "reasonably believed" to make it appear to be a Finding by the Court itself regarding the merits of the Agreement.[16] He goes on to quote one of the most erroneous paragraphs in the Ninth Circuit's opinion on page 20, i.e., the one which states that the Agreement contains various items such as a "cost-benefit analysis" which simply are not there. See: Pt. 15-16. That quotation is followed by another excerpt from the decision below which misstates, among other things, that the "judge had heard testimony on the value of the corporation's assets" when: 1) the Trustee's counsel had objected to valuation testimony on the grounds of relevancy; and, 2) the Trustee had admitted his inability to value the *Estate's* assets—K & K stock.

The Trustee dismisses the failure to respond to major objections made by Petitioners simply by quoting language from the decision below which tracks the Fifth Circuit's language from *In the Matter of Jackson Brewing Co.*, 624 F.2d 605, 612 (5th Cir. 1980). The important difference between the present matter and *Jackson Brewing* is that the Fifth Circuit reached its conclusion after having noted that the District Judge had issued a 33 page opinion.

---

[16]Finding of Fact 9 was designed to serve as the predicate for the materially erroneous Conclusion of Law 5. Cf. App. Pt. 70-71 and 73.

Respectfully submitted,

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September 26, 1986

APPENDIX

APPENDIX A

Excerpt from Reporter's Transcript of Proceedings Dated April 8, 1982, in connection with the Fairness Hearings.

* * *

"MR. NOBLE: 'And the Martin Superior Court Cross-Complaint.' "

"THE COURT: 'And those are the two actions that are not properly described?' "

"MR. NOBLE: 'Also the Martin lawsuit in H. Our particular concerns are with F and G. And without limiting the objections that are set forth in detail in our written objections, those objections are twofold.

'One, w-r-i-t-t-e-n. They don't tell the creditors at all what they are about. *And, secondly, they don't tell 450 of the creditors—that is to say, the members of the legal action committee*—that they are A class [sic] plaintiffs in adversary D. They do not tell them that the legal action committee itself is a cross-complainant in the Superior Court action. *And they also don't tell these 450 people, the members of an incorporated association.*

'They are arguably named as defendants in the Complaint in the Superior Court action which is being released in one direct; that is to say, the agreement calls on the cross-complaint to be dismissed, but not the main action.' "

"THE COURT: 'Who is representing these cross-complainants?' "

"MR. NOBLE: 'We are.' "

"THE COURT: 'Well, haven't you told them? See, what you are complaining about is that your people haven't

been told what their lawsuits are about, if I understand you.' "

"MR. NOBLE: 'They have not been told that this is settling their lawsuit.' "

"THE COURT: 'They haven't.' "

"MR. NOBLE: 'They haven't.' "

"THE COURT: 'I see.' "

"MR. NOBLE: 'And as you know, Your Honor,—' "

"THE COURT: 'But they are well represented here today?' "

"MR. NOBLE: 'The reason there is class notice—' "

"THE COURT: 'Answer me.' "

"MR. NOBLE: 'Yes?' "

"THE COURT: *'I asked a question. Are they not well represented here today?'* "

"MR. GILL: *'I will stipulate to that.'* "

"THE COURT: *'Pardon?'* "

"MR. GILL: *'I'll stipulate to that fact, your Honor.'* "

"THE COURT: *'You are here, you are their attorney?'* "

"MR. NOBLE: *'That's correct.'* "

"THE COURT: *'So how are they being shortchanged by not being told in the Notice of Compromise about this, since you are here as their attorney?'* "

"MR. NOBLE: *'Your Honor, there are noticed procedures.'* "

"THE COURT: *'I know there are, but you represent all those people and you got noticed.'* " R.T. 1219:22-1221:24 (Emphasis added).

APPENDIX B

Excerpt from Reporter's Transcripts of Proceedings Dated February 23 and April 12, 1982, in connection with the Fairness Hearings.

"Q. [By Mr. Noble:] 'Other than the fact that they took them back, did Kane and Kelly give the corporation anything for the 40,000 shares?' "

"A. 'Not that I'm aware of.

'Unless you're referring to what Kane and Kelly did as part of the 1977 statement.' "

"Q. 'No, I'm talking about what they just went and said we want our 40,000 shares back, there was no bargaining exchange then?' "

"A. 'If there was, I was not a party to it.' "

"Q. 'You're not aware of it today, I gather?' "

"A. 'I'm not.' "

"Q. 'Do you recall what the value of those shares was when they took them back?' "

"A. 'Mr. Noble, how do you value shares of this corporation? 'I don't know how to answer your question.' "

"Q. 'You have no educated guess as to what they were worth when they took them back?' "

"A. '*Mr. Noble, I don't know how you value shares in this corporation.*

'There are many different formulas to use, many different approaches for the ESOT.

'I told you, on Page 7 of the settlement agreement they valued the shares at 62 cents. Is that the share you're looking for?

'The next paragraph on Page 7 says they valued for the ESOT purposes 80 cents a share. Is that the value you're looking for?' "

"Q. 'I'm looking for what they were really worth.' "

"A. 'I don't know what they were really worth.' " R.T. 957:16-958:21.

* * *

"Q. [MR. NOBLE:] 'At some time after your engagement of your firm's engagement on November 5th, did you form an opinion as to the value of the assets of K & K Properties?' "

"MR. GILL: *'If it please, Your Honor, I would object. The issue of the value of the properties is immaterial and irrelevant to the issues before the court, which deal with the questions of whether there were disputes which ought to be compromised and whether the compromise that has been made is in the best interests of creditors.*

'What has happened in this compromise is a block of stock has transferred. A percentage interest in ownership of the corporation is transferred from Kane and Kelly to the trustee as well as other cash considerations owing, the value of the property. Whether he's valued at the ESOP value or at some value is irrelevant. The significant part is that a significant percentage of ownership of the company has shifted. *The question of how much the stock is worth is interesting in many respects, but it does not bear on the compromise.*' "

"THE COURT: 'Mr. Noble?' "

"MR. NOBLE: 'Your Honor, I—' "

"THE COURT: 'Actually what's happened is that the balance is shifted in favor of the trustee of A & C Properties. That's as to the ownership involved. Am I incorrect on that? Somewhere we've got this laid out.' "

"MR. GILL: 'The balance has also been in favor of the trustee. The percentage interest has—' "

"MR. NOBLE: 'Your Honor, it's gone back and forth, if I can explain that.' "

"THE COURT: 'No, don't bother right now, Mr. Noble.' "

"MR. GILL: 'I think it would be fair to state that the percentage interest of the trustee subsequent to the settlement would be greater than the percentage interest of the trustee prior to the 1982 settlement.' "

"THE COURT: 'That's what I thought it was when I made my remark.' "

"MR. GILL: 'The trustee is and will be the substantial majority shareholder in any event.' "

"THE COURT: 'Mr. Noble, do you want to be heard on his objection?' "

"MR. NOBLE: 'Yes, Your Honor.

'As a portion of the settlement agreement, certain shifts occurred in ownership percentages back and forth. *The litigation which is being settled involves relinquishing causes of action related to other interests in the corporation. And as a consequence, I don't know how one gets to an evaluation of what the settlement actually does with-*

out knowing the value of the underlying assets. That has been the issue in all of these related proceedings for low these many years.'"

"THE COURT: 'Well, how are you going to settle that? You've had these for low these many years. How are you going to settle it?'"

"MR. NOBLE: 'Well, I was in hopes of Mr. Looby—'"

"MR. GILL: 'Well, Your Honor, Mr. Looby, who is Mr. Noble's witness and who is tax counsel, has certainly not been qualified as an expert appraiser, Mr. Noble knows very well, if it were material and relevant to put on evidence as to the value of the property. And this does not advance Mr. Noble's position.

'I think the Court will agree that we have been rather patient in allowing Mr. Noble wide latitude, that day after day goes by without any appreciable progress, and we have to insist upon a more technical application of the rules of evidence.'"

"THE COURT: '*All right. I will sustain the objection.*'" R.T. 1363:21-1366:8. (Emphasis added).